SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 27

F. J. GUNTHER, PETITIONER,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 2, 1965

[fol. 2]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 2459-SD-W

No. 36 291

F. J. GUNTHER, Petitioner,

—vs.—

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, Defendant.

PETITION TO ENFORCE AWARD AND ORDER OF NATIONAL RAILROAD ADJUSTMENT BOARD—Filed September 26, 1960

Petitioner alleges:

I

This action is brought pursuant to 45 USCA 153(p) and the above entitled court has jurisdiction of said action under the provisions thereof.

II

At all times herein mentioned, defendant was, and now is, a corporation organized and existing pursuant to the laws of the State of Nevada. At all such times, said defendant was, and now is, a carrier by railroad subject to the Interstate Commerce Act with its principal operating office located in the Southern District of California.

III

Petitioner was employed by defendant on December 18, 1916, as a fireman and thereafter was continuously in the active service of defendant until disqualified therefrom as

[fol. 3] hereinafter alleged. Petitioner was promoted to locomotive engineer on December 4, 1923, and his seniority as a locomotive engineer as established by the collective bargaining agreement hereinafter referred to runs from that date.

IV

At all times hereinafter mentioned, petitioner's employment with defendant was governed by the terms of the Agreement by and between the San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers. Said Agreement does not require employees covered by same to retire from active service at any stated age limit. By the terms of said Agreement, at all times hereinafter mentioned the petitioner had seniority rights which entitled him to continue in the active service of defendant as a locomotive engineer.

V

On December 30, 1954, shortly after petitioner's 71st birthday, defendant removed petitioner from active service on the ground that he was not physically qualified to perform the duties of locomotive engineer. At said time, petitioner's physical and mental fitness was comparable to that of men much younger than he and he was qualified physically to perform the duties which defendant required of its locomotive engineers. Said disqualification of petitioner by defendant was, in fact, imposition upon petitioner of compulsory retirement in violation of petitioner's rights under said Agreement.

VI

Following said disqualification, petitioner presented his claim for reinstatement to active service to defendant and, upon denial thereof, submitted said claim to the National Railroad Adjustment Board, First Division, in conformity with the provisions of the Railway Labor Act. Said claim [fol. 4] was assigned Docket No. 33-531 by said Board.

Thereafter, on October 2, 1956, said Board made its findings upon said claim, issued its award thereon and made its order pursuant to said award. A true copy of said findings, award and order, marked "Exhibit A," is attached hereto and incorporated herein by reference.

VII

Following the issuance of said findings, award and order, the neutral board of physicians therein provided for was selected. Although two of the members of said board reported that they found no defect which, in their opinion, would prevent petitioner from performing his duties as a locomotive engineer, defendant again failed and refused to reinstate petitioner to active service.

VIII

Thereafter, on June 30, 1958, petitioner filed a supplemental submission of said claim with said National Railroad Adjustment Board, First Division, asking said Board to render an interpretation of said award of October 2, 1956, and on October 8, 1958, said Board made its interpretation, issued its award thereon, and made its order pursuant to said award, a true copy of said interpretation, award and order, marked "Exhibit B," is attached hereto and incorporated herein by reference.

IX

Following the making and issuance of said interpretation, award and order, petitioner made demand upon defendant to comply with the terms thereof but defendant failed and refused to do so and has continued to fail and refuse to comply with same to the date hereof.

X

By reason of the premises, petitioner has been deprived of his right, pursuant to said Agreement, to continue in the active service of defendant as a locomotive engineer

[fol. 5] since December 30, 1954 and has thereby sustained a wage loss to the date hereof in the approximate amount of $50,000. Petitioner prays leave, upon ascertaining the exact amount of said wage loss, to amend this petition accordingly.

Wherefore, petitioner prays

1. For an order of Court enforcing the award and order of the National Railroad Adjustment Board, First Division, in said Adjustment Board proceeding, Docket No. 33-531,

2. For an order of this Court requiring defendant to reinstate petitioner to active service in accordance with his seniority under said Agreement,

3. For damages in the amount required to compensate petitioner for wages and other monetary benefits lost by reason of the premises, and

4. For such other and further relief as the Court deems meet and just in the premises.

Date: September 23, 1960.

Clifton Hildebrand, Hildebrand, Bills & McLeod, Charles W. Decker, By Charles W. Decker, Attorneys for Petitioner.

[File endorsement omitted]

[fol. 6] *Duly sworn to by Fred J. Gunther, jurat omitted in printing.*

[fol. 7]

EXHIBIT A TO PETITION

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

With Referee Mortimer Stone

Award 17 646

Docket 33 531

PARTIES TO DISPUTE (Brotherhood of Locomotive Firemen and Enginemen
(San Diego and Arizona Eastern Railway Company

STATEMENT OF CLAIM: "Request for reinstatement of Engineer F. J. Gunther to service with all seniority rights unimpaired and pay for all time lost account of physical disqualified and taken out of service December 30, 1954.

FINDINGS The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claim of engineer for reinstatement in service and pay for time lost. Shortly after his 71st birthday claimant was disqualified from service by the chief surgeon on the basis of a physical examination by a company physician at Los Angeles. Upon his request he was then sent to the Southern Pacific General Hospital at San Francisco and there examined by carrier's medical superintendent following which the chief surgeon determined that he should not be returned to service.

Thereupon claimant went for examination to a recognized specialist at San Diego and on the basis of his report requested that a three doctor board be appointed to reexamine his physical qualification for return to service.

Upon denial of this request claim for reinstatement and back pay was filed in this Division resulting in Award 17 161 in which the claim was dismissed without prejudice on the ground that there was no showing whether or not claimant's physician and the company physicians disagreed as to claimant's physical qualifications. Now the claim has been progressed again with the inclusion of further statement by claimant's physician.

Carrier contends that notwithstanding such statement or any disagreement there is no rule permitting the appointment of a neutral medical board as here sought and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

It is true that carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It is true also that the [fol. 8] employe has the right to priority in service according to his seniority and pursuant to the agreement so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service.

If carrier through its medical staff has removed an employe from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service.

Since determination of the facts necessary to enable the Division to make proper award on such issue requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three qualified physicians, one chosen by

carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. In such case the Division predicates its award upon the finding of the board of physicians.

While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians.

If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians.

AWARD: Claim disposed of per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: /s/ J. M. MACLEOD
Executive Secretary

Dated at Chicago, Illinois,
This 2nd day of October 1956.

[fol. 9]

Form 2

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

Award 17 646

Docket 33 531

ORDER

TO: San Diego and Arizona Eastern Railway Company

Mr. W. B. Eastman, Vice President and General Manager

The carrier addressed, party to the docket identified above, is hereby ordered to make effective the award, which is attached and made a part hereof, as therein set forth and, if the award includes a requirement for the payment of money, to pay the employe (or employes) the sum to which he is (or they are) entitled on or before November 2, 1956

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: /s/ J. M. MACLEOD
Executive Secretary

Dated at Chicago, Illinois,
This 2nd day of October 1956.

[fol. 10]

EXHIBIT B TO PETITION

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

With Referee Mortimer Stone

INTERPRETATION

Award 17 646

Docket 33 531

PARTIES TO DISPUTE (Brotherhood of Locomotive Firemen and Enginemen (San Diego and Arizona Eastern Railway Company

INTERPRETATION

This docket presents claim previously before this Division with the present Referee sitting as a Member, which resulted in Award 17 646. As appears therein claimant had been held by carrier's chief surgeon to be no longer physically qualified to remain in service and the Division determined that there was sufficient disagreement as to claimant's physical condition to justify inquiry and finding by a board of three physicians, as not unusually required. It was declared that if the decision of the majority of such board should support the decision of carrier's chief surgeon the claim would be denied; if not, it would be sustained with pay pursuant to rule on the property, from October 15, 1955.

On June 30, 1958 claimant filed with the Division a supplemental submission setting out that following said award a board of three physicians had been agreed on and established as provided for therein, and that the findings and decision of the majority of said board did not support the decision of carrier's chief surgeon but found that claimant had no physical defect which would prevent him from

carrying on his usual occupation, but that carrier advised claimant that "the findings of the three doctor board have been reviewed by the chief surgeon and interpreted to be such that you should not be returned to duty", and refused to reinstate claimant or pay him for time lost. Wherefore claimant sought a new or supplemental award or an interpretation, to make absolute his right to reinstatement and pay for time lost.

Carrier now requests permission to file an answer to petitioner's submission and asserts that the Referee has authority to resolve any question of procedure in the matter before him. Claimant's submission was filed more than ninety days before the request without any request appearing for extension of time. In the meantime the Division deadlocked on the disposition of the dispute and it was submitted to the National Mediation Board which appointed a Referee; then the docket was given the Referee for study and thereafter on the day the matter came on for oral argument carrier made its request for permission to file answer. Even then no answer was tendered or time suggested when one might be prepared. In such situation, if the Referee has such authority as urged by carrier representatives permission would be denied.

[fol. 11] We find from the record that the statements set out in claimant's submission are true; that a board of three physicians was selected by agreement of the parties for the purpose of determining claimant's physical qualification for service; that the majority of said board properly examined claimant and that their findings and decision therefrom did not support the decision of carrier's chief surgeon but that they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as engineer.

The issue of fact upon which the prior Award 17 646 was conditioned having been determined in favor of claimant, said conditional award should be made absolute and final and the claim sustained as therein provided.

AWARD: Claim sustained for reinstatement with pay for all time lost from October 15, 1955 pursuant to rule on the property.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: /s/ J. M. MACLEOD
Executive Secretary

Dated at Chicago, Illinois.
This 8th Day of October 1958.

[fol. 12]

Form 2

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

INTERPRETATION

Award 17 646

Docket 33 531

ORDER

To: San Diego and Arizona Eastern Railway Company
Mr. K. K. Schomp, Manager of Personnel

The carrier addressed, party to the docket identified above, is hereby ordered to make effective the award, which is attached and made a part hereof, as therein set forth and, if the award includes a requirement for the payment of money, to pay the employe (or employes) the sum to which he is (or they are) entitled on or before November 8, 1958.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: /s/ J. M. MACLEOD
Executive Secretary

Dated at Chicago, Illinois,
This 8th Day of October 1958.

[fol. 13]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

(Formerly No. 36291 Civil No. 2080-SD-W)

[Title omitted]

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT—Filed November 28, 1960

To: Hildebrand, Bills & McLeod, 1212 Broadway, Oakland 12, California; Charles W. Decker, 45 Polk Street, San Francisco 2, California, Attorneys for F. J. Gunther, Petitioner; and F. J. Gunther, Petitioner:

Please Take Notice that the San Diego & Arizona Eastern Railway Company will move the Court at the United States Custom House and Courthouse, San Diego, California, on December 14, 1960, at 2:00 P.M., or as soon thereafter as counsel can be heard, for entry of summary judgment herein in favor of San Diego & Arizona Eastern Railway Company against F. J. Gunther, together with costs and disbursements, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and in support of this motion this defendant will present the affidavit and the memoran-

[fol. 14] dum of points and authorities attached hereto.

Defendant San Diego & Arizona Eastern Railway Company moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter judgment for the defendant on the ground that there is no genuine issue as to any material facts in this action, and that defendant is entitled to a judgment as a matter of law, as appears from the pleadings on file in this action and the affidavit and memo-

[File endorsement omitted]

randum of points and authorities attached hereto and made a part hereof.

Respectfully submitted,

Gray, Cary, Ames & Frye, James W. Archer, Eugene L. Freeland, W. A. Gregory, William R. Denton, By W. A. Gregory, Attorneys for Defendant.

[fol. 15] Proof of Service by Mail (omitted in printing).

[fol. 16]

ATTACHMENT TO NOTICE OF MOTION, ETC.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

(Formerly No. 36291 Civil No. 2080-SD-W)

[Title omitted]

AFFIDAVIT OF K. K. SCHOMP—Filed November 28, 1960

State of California,
City and County of San Francisco, ss.

K. K. Schomp, being first duly sworn, deposes and says:

I am a citizen of the United States and of the State of California, residing in San Francisco County; my office headquarters are at 65 Market Street, San Francisco, California.

I am Manager of Personnel of the San Diego & Arizona Eastern Railway Company and am thoroughly familiar

[File endorsement omitted]

with the collective bargaining agreement relating to the wages, rules and working conditions of its personnel. In my present position I represent the Company in negotiations with representatives of the employees, including the employees engaged in engine, train and yard service represented by the various operating brotherhoods.

[fol. 17] I make this affidavit for use in connection with the motion for summary judgment filed by defendant in this action. I am familiar with the case of Mr. F. J. Gunther, which is pending before this Court under the above-entitled number. I am also familiar with the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers. In December, 1954, when Mr. Gunther last performed active service as a locomotive engineer, the applicable printed agreement was a green colored booklet dated March 1, 1935, which was on file with the Court as Defendant's Exhibit 1 in Mr. Gunther's prior case (Civil No. 2080-SD-W). A copy of this agreement is attached as Exhibit A to this affidavit. On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service.

The physical examination requirements for locomotive engineers of San Diego & Arizona Eastern Railway Company at the time Mr. Gunther became seventy years of age were and still are that such employees immediately prior to the date when they reach seventy years of age must take and pass a physical examination (denominated as a re-examination) to determine their physical fitness to remain in service. A similar examination must be taken during each three-month period of service thereafter. In accordance with the foregoing requirement, Mr. Gunther reported for physical re-examination on November 24, 1953, and at each successive ninety-day interval until December

15, 1954. On the basis of the findings of Company physicians with respect to his physical condition on the latter date it was determined that he was no longer physically qualified to remain in active service as a locomotive en-
[fol. 18] gineer. These findings were reviewed at the Southern Pacific Hospital in San Francisco by the Chief Surgeon, who concurred in the findings and opinion that Mr. Gunther's heart was in such condition that he would be likely to suffer an acute coronary episode. Based upon this conclusion Mr. Gunther was physically disqualified, as aforesaid, on December 30, 1954.

I have examined the documents entitled Exhibits "A" and "B" to the petition in this action and find them to be true and correct copies of the documents issued by the First Division, National Railroad Adjustment Board, on the dates indicated thereon.

K. K. Schomp

Subscribed and sworn to before me this 23rd day of November, 1960.

H. G. Bunn, Jr., Notary Public in and for the City and County of San Francisco, State of California.

[fol. 19] CLERK'S NOTE

Exhibit A to Affidavit of K. K. Schomp, "Agreement—San Diego & Arizona Eastern Railway Company and Brotherhood of Locomotive Engineers, Rules Effective March 1, 1935, Revised Rates of Pay Effective October 1, 1937" (omitted in printing).

[fol. 39]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Civil No. 2459-SD-W

(Formerly No. 36291 Civil No. 2080-SD-W)

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP—
Filed December 2, 1960

State of California,
City and County of San Francisco, ss.

K. K. Schomp, being first duly sworn, deposes and says:

I am Manager of Personnel of San Diego & Arizona Eastern Railway Company and I have heretofore made an affidavit in support of defendant's motion for summary judgment in this case.

As I stated in the affidavit dated November 23, 1960, the employment of Mr. F. J. Gunther at all times material to the pending action was subject to the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers, dated March 1, 1935, as amended. On December 30, 1954, the date on which Mr. Gunther was released from active service because of the doctor's report of his physical [fol. 40] condition, the aforesaid collective bargaining agreement, including amendments thereto, contained no provision whatever relating to a three-doctor panel which could review the medical findings of the defendant's doctors with respect to the physical condition and ability of its locomotive engineers to operate its trains.

Since December 30, 1954, there had been no such agreement or amendment until the agreement signed on November 3, 1959, to become effective December 1, 1959, a copy of which is attached as Exhibit A hereto, with the exception

[File endorsement omitted]

of amendment to Article 35, Section 3(c), of the applicable agreement, effective February 1, 1957, which had no application to the circumstances involved in the employment of Mr. Gunther, and which was predicated solely upon the prior institution of legal proceedings by an employee.

I enclose as Exhibit B hereto the demand of the Brotherhood of Locomotive Engineers which culminated in Exhibit A hereto. This demand is dated August 28, 1958, and seeks the inclusion of a three-doctor panel in the existing collective bargaining agreement to which I have heretofore referred.

K. K. Schomp

Subscribed and sworn to before me this 1st day of December, 1960.

H. G. Bunn, Jr., Notary Public in and for the City and County of San Francisco, State of California.

Received a copy of the within Supplemental Affidavit this 1st day of December, 1960.

Charles W. Decker

[fol. 41]

EXHIBIT A TO SUPPLEMENTAL AFFIDAVIT BY K. K. SCHOMP

SD&AE E&F 1-1310

AGREEMENT

between

SAN DIEGO AND ARIZONA EASTERN RAILWAY COMPANY
and its engineers represented by the
BROTHERHOOD OF LOCOMOTIVE ENGINEERS

* * * * * * *

It is hereby understood and agreed that Section 1, Article 35, of the agreement between the above parties, covering rates of pay, rules and working conditions, signed October 25, 1955, and which became effective January 1, 1956, is amended by adding the following thereto:

When an engineer has been removed from his position or has been restricted from performing service to which he is entitled by seniority on account of his physical fitness and desires the question of his physical ability to conform to prescribed standards to be determined before he is permanently removed or restricted, he shall be privileged to have his case handled as follows:

A special panel of doctors consisting of one doctor selected by the Company, one doctor to be selected by the employe or his representative, the two doctors to confer and if they do not agree on the physical condition of the engineer, they shall select a third doctor specializing in the disease, condition or physical ailment from which the engineer is alleged to be suffering.

Such panel of doctors shall fix a time and place for the engineer to meet with them for examination. The decision of the majority of said panel of doctors of the engineer's physical fitness to remain in service or have restrictions modified shall be controlling on both the Company and the engineer. This does not, however, preclude a reexamination at any subsequent time should the physical condition of the engineer change.

The doctors selected by the Company and the engineer or his representative shall be specialists in the disease or ailment from which the engineer is alleged to be suffering.

[fol. 41½] The Company and the engineer will be separately responsible for any expense incurred by the doctor of their choice. The Company and the engineer shall each be responsible for one-half of the fee and expense of the third member of the panel.

This agreement is effective December 1, 1959, and cancels all settlements, rulings, understandings, and practices in conflict therewith.

Signed at San Francisco, California, this 3rd day of November, 1959.

FOR THE COMPANY:

/s/ K. K. SCHOMP
Manager of Personnel

FOR THE EMPLOYES:

/s/ J. P. COLYAR
General Chairman
Brotherhood of Locomotive Engineers

[fol. 42]

EXHIBIT B TO SUPPLEMENTAL AFFIDAVIT OF K. K. SCHOMP

SD&AE E&F 1-1310

J. P. COLYAR
Chairman
539 Pacific Building
San Francisco 3, Calif.

GARFIELD 1-7199

GENERAL COMMITTEE OF ADJUSTMENT
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
SOUTHERN PACIFIC COMPANY (PACIFIC LINES)
FORMER EL PASO & SOUTHWESTERN SYSTEM
NORTHWESTERN PACIFIC RAILROAD COMPANY
SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY
OREGON, CALIFORNIA & EASTERN RAILWAY COMPANY
SOUTHERN PACIFIC RAILROAD COMPANY OF MEXICO

August 28, 1959

Mr. K. K. Schomp (6)
Manager of Personnel
Southern Pacific Company
San Francisco 5, California

Org. File E-20037-32-3(b) SP
24-2(b) EP&SW
35-1 SD&AE

Dear Sir:

This will serve as thirty days notice, as required by Section 6 of the Railway Labor Act, as amended and Article 36 of the agreement covering engineers on the Southern Pacific (Pacific Lines), Article 30 of the agreement covering engineers on the Former EP&SW, and Article 68 of the agreement covering engineers on the San Diego and Arizona Eastern, of the Committee's desire and intent to adopt the following as the second paragraph of Section 3(a), Article 32, SP engineers' agreement; the second paragraph

of Section 2(b), Article 24 of the former EP&SW engineers' agreement, and as the second paragraph of Section 1, Article 35 of the SD&AE engineers' agreement:

"When an engineer has been removed from his position or has been restricted from performing service to which he is entitled by seniority on account of his physical condition, and desires the question of his physical condition to be decided before he is permanently removed or restricted, he shall be privileged to have his case handled as follows:

"A special panel of doctors consisting of one doctor selected by the Company, one doctor to be selected by the employe or his representative, the two doctors to confer and if they do not agree on the physical condition of the engineer, they shall select a third doctor specializing in the disease, condition or physical ailment from which the engineer is alleged to be suffering.

"Such panel of doctors shall fix a time and place convenient to the engineer, for the engineer to meet with them for examination. The decision of the majority of said panel of doctors of the engineers physical fitness to remain in service or have restrictions [fol. 43] modified shall be controlling on both the Company and the engineer. This does not however, preclude a reexamination at any subsequent time should the physical condition of the engineer improve.

"The doctors selected by the Company and the engineer or his representative shall be a specialist in the disease or ailment from which the engineer is alleged to be suffering.

"The Company and the engineer will be separately responsible for any expense incurred by the doctor of their choice. The Company and the engineer shall each be responsible for one-half of the fee and expense of the third member of the panel."

Please advise the time and place for initial conference.

Yours truly,

/s/ J. P. Colyar

[fol. 44]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

MINUTE ORDER, JUDGE WEINBERGER'S CALENDAR,
March 27, 1961.

The defendant's motion for summary judgment as to grounds labelled I and II in its brief filed November 28, 1960, is denied. The said motion as to ground labelled III is denied without prejudice for the reasons set forth in our memorandum filed this day.

Copies to: Charles W. Decker, 45 Polk, San Francisco 2, California;

Gray, Cary, Ames & Frye, 1410 Bank of America Building, San Diego 1, California.

[fol. 45]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil No. 2459-SD-W

F. J. GUNTHER, Petitioner,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, Defendant.

MEMORANDUM OPINION—March 27, 1961.

On November 28, 1960 defendant made a Motion for Summary Judgment on the ground that "There is no genuine issue as to any material facts in this action and that de-

[File endorsement omitted]

fendant is entitled to a judgment as a matter of law."

Rule 3 (d) (2) of the Local Rules of our District provides:

"There shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue.

"Any party opposing the motion may, not later than three days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

"In determining any motion for summary judgment, the [fol. 46] court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion."

The above mentioned Rule was promulgated after due consideration by the Judges of this District, and has proven to be of great assistance in the determination of motions for summary judgment and in making clear records of the contentions of the parties and the judgments of the Courts.

Counsel for the moving party did not comply with this Rule, and this Court has experienced some difficulty in determining the actual matters intended to be urged.

It appears, however, that counsel for the defendant has put forth two or three different grounds upon which the motion is based. This we gather from the brief filed in support of the motion on November 28, 1960.

At Page 6, paragraph heading "I", counsel states: "The Judgment in The Prior Action In This Court Between The Same Parties On The Same Cause Of Action Constitutes A Bar To This Action". Under such heading, Section "A" counsel states: *"An action to enforce an award of the NRAB is a trial de novo on the cause of action alleged before the*

Board. The Award itself does not create a cause of action". It is then urged that the petitioner is entitled to relief, if at all, not because he has an award and interpretation thereof, but because his rights under the collective bargaining agreement were violated when he was removed from service December 30, 1954. It is stated, "His cause of action arose from the events of that day."

Counsel then contends, under "B" at Page 8, that *"The principle of res judicata bars this action of petitioner after* [fol. 47] *the purported interpretation, for the issues to be decided in this action have already been raised and decided in the prior action between the same parties."*

Under "C" at Page 10, counsel states: *"The scope of the bar of res judicata includes not only all matters which were raised in the prior proceeding but also all matters which could have been raised."*

With the heading, "II" at Page 12, it is argued: "As the October 8, 1958, Interpretation and Order are the Same Cause of Action Presented in the Prior Case, Their Presentation at This Time to *This Court is Barred by the Statute of Limitations."* Under this latter section, there is quoted a portion of the Railway Labor Act (45 U. S. C. A. 153, First (q)) to the effect that all actions at law based under the provisions of the section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board.

We direct attention of counsel to our Memorandum Opinion of April 15, 1958, filed in the prior case No. 2080-SD-W, (161 F. Supp. 295). Our Findings and Conclusions in such case, filed April 8, 1959, were as follows:

> "Defendant San Diego & Arizona Eastern Railway Company's motion for summary judgment having come on regularly for hearing on February 21, 1958, before the above-entitled court, Honorable Jacob Weinberger, Judge presiding, the petitioner appearing by Hildebrand, Bills & McLeod and Charles W. Decker, by Charles W. Decker, Esq., and the defendant appearing by James W. Archer, Eugene L. Freeland, Burton

Mason, W. A. Gregory and Harold S. Lentz, by James W. Archer, Esq., W. A. Gregory, Esq. and Eugene L. Freeland, Esq., and the said motion having been fully [fol. 48] argued and the court having considered the pleadings, the admissions of the parties hereto, and the affidavits on file with the said motion, and the said motion having been submitted to the court for decision, and the court having issued its MEMORANDUM OPINION AND ORDER April 15, 1958 which provided, in part, for a continuance of this cause to July 14, 1958, at which time, in the absence of any cause to the contrary shown, defendant was to be permitted to present to the Court findings of fact, conclusions of law and a judgment in accordance with said Memorandum Opinion and Order, and petitioner's motion for a stay of proceedings having been noticed and heard on July 14, 1958, and the Court having ordered a stay of the proceedings herein to February 16, 1959, and on said date having continued the defendant's motion and the presentation of findings, etc. to March 6, 1959, and the said parties by the said attorneys having appeared on said date and said motion having been again fully argued and the court being fully advised in the premises, the court now makes its findings of fact, conclusions of law and order for summary judgment as follows, to wit:

FINDINGS OF FACT

It appears to the court that material facts which exist herein without substantial controversy are:

1. Defendant at all times pertinent to this action was, and now is, a corporation organized and existing pursuant to the laws of the State of Nevada, and was and now is a carrier by railroad subject to the Interstate Commerce Act.

[fol. 49] 2. Petitioner was employed by defendant on December 18, 1916, as a fireman and was promoted to locomotive engineer on December 4, 1923, and was so employed by defendant until December 30, 1954.

3. On December 30, 1954 the terms of petitioner's employment with defendant were governed by the agreement by and between San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers and the said agreement established the rights, duties and relationship of the parties hereto.

4. On December 30, 1954, defendant removed petitioner from active service as a locomotive engineer on the ground that he was no longer physically qualified to remain in active service as a locomotive engineer.

5. On November 18, 1955 petitioner submitted his claim for reinstatement to the service of defendant with compensation for time lost by reason of said removal from service to the National Railroad Adjustment Board, First Division, and said claim was assigned Docket No. 33-531 by said Board. Thereafter, on October 2, 1956 said Board made its findings upon said claim, and issued its order.

6. The findings of said Board provided in part as follows:

> '*Since determination of the facts necessary to enable the Division to make proper award* on such issue requires expert medical competence, it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision, for the Division to provide for a neutral board of three [fol. 50] qualified physicians, one chosen by carrier and one by the employe and the third by the two so selected, for the purpose of determining the facts as to a claimant's disability and the propriety of his removal from service. *In such case the Division predicates its award upon the finding of the board of physicians.* (Emphasis supplied)
>
> While the statement of claimant's physician now submitted is generally equivocal we think that when considered in connection with his prior report and that of carrier's medical superintendent, it discloses

sufficient substantial disagreement as to claimant's physical condition to justify further check up and inquiry by such a neutral board of physicians.

If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians.

AWARD: Claim disposed of per Findings.'

The Order provides as follows:

'The carrier addressed, party to the docket identified above, is hereby ordered to make effective the award, which is attached and made a part hereof, as therein set forth and, if the award includes a requirement for [fol. 51] the payment of money, to pay the employe (or employes) the sum to which he is (or they are) entitled on or before November 2, 1956.'

7. Pursuant to such findings and order, the carrier appointed a physician, the petitioner appointed a physician and the two so appointed selected a third physician, comprising a board of physicians. The reports of such physicians have been made of record in this case.

8. The defendant has refused to return petitioner to active service or to pay him back wages.

CONCLUSIONS OF LAW

The Court concludes:

1. The Court has jurisdiction of the subject matter of this action and of the parties hereto.

2. It is not necessary or proper for the purpose of deciding this motion for summary judgment that the Court consider whether the National Railroad Adjust-

ment Board had jurisdiction to order the appointment of a board of physicians to examine petitioner.

3. It is not necessary or proper for the purpose of deciding this motion for summary judgment that the Court consider the terms of the agreement between the defendant and the Brotherhood of Locomotive Engineers mentioned in Paragraph 3 of the findings herein.

4. There is no genuine issue as to any material fact and the admitted facts show that the National Railroad Adjustment Board, had not, as of the date of filing the petition herein, made any award and order pursuant thereto with which the carrier defendant has not complied.

5. The defendant is entitled to judgment herein and to its costs."

[fol. 52] We do not agree with defendant that the statute has run as against the petitioner. The latter was seeking reinstatement, and he had no recourse to our court until the National Railroad Adjustment Board had issued an order with which the railroad had refused to comply. See Slocum v. Delaware, 339 U. S. 239. Such a situation did not exist under the facts and order presented in the first action. This Court expressly did not adjudicate the rights of the parties under the collective bargaining agreement; such an adjudication is expressly sought in the present action.

Counsel for the moving party contends that because the second order of the Board and the refusal of the railroad to comply with it were not brought into the first action by a supplemental petition that petitioner is barred from bringing the present action. Again we point out that the Court expressly found it not necessary in the first action to adjudicate the merits of the controversy over the terms of the bargaining agreement.

We do not agree that the Judgment in the first action is res judicata of this, the second action which is before us now.

Under heading "III" of its brief at Page 14, the Railroad urges that the petitioner cannot rely upon any decision of the National Railroad Adjustment Board unless there is some provision in the contract between the Union and the railroad limiting the right of the defendant to remove its engineers from active service when it finds that they are no longer physically qualified for such service. Defendant urges that no such provision is found in the contract, and wishes us to so interpret the agreement and grant the motion for summary judgment. At the same time, defendant has filed an affidavit wherein it has been stated [fol. 53] that a "practice" of the railroad existed with reference to retirement after a certain age. Petitioner has not filed a counter-affidavit. If evidence along this line has any bearing on the issues, and there are cases which refer to a "practice" or "plan" of compulsory retirement, then this Court should have more information regarding the same, for instance, the period during which it existed. If a "practice" or "plan" has no bearing, then the affidavit mentioning the same should not be made a part of the record. We have reviewed a few cases, not cited by counsel, which deal with the subject just mentioned, and no doubt counsel for the parties, as experts in this field of law, will be able to cite other cases. (See: United Protective Workers of America v. Ford Motor Co., 194 F. 2d 997, United Protective Workers v. Ford, 223 F. 2d 49, United Steel Corporation v. Nichols, 229 F. 2d 396.)

Counsel for petitioner contends that the latter should not be deprived of his day in court by the granting of a motion for summary judgment. He argues that the absence of a specific contractual provision limiting defendant's right to determine the physical fitness of its employees does not compel the Court to infer that such a limitation *does not* exist. Counsel for petitioner also says that the entire contract should be construed, but that the contract is not now before the Court.

In the affidavit of K. K. Schomp, filed by the defendant on November 28, 1960, it is stated that a copy of the Agreement in effect as of December, 1954, (when Mr. Gunther last performed active service for the defendant) is attached

to the affidavit as Exhibit "A". If counsel for the petitioner denies that Exhibit "A" of said affidavit, as the same appears in the Clerk's file, is not the contract in controversy, then there is, of course, need for clarification.

[fol. 54] Counsel for the petitioner likewise hints that the contract is ambiguous and that a limitation upon the right which the defendant claims might be found in the contract in the light of parol evidence admitted as an aid in interpreting it. Counsel for the petitioner, however, has filed no affidavit to show what parol evidence he deems important, nor, for that matter has he pointed out in what particulars the contract may be ambiguous.

Summary judgment is an extreme remedy and should be awarded only when the facts are quite clear. (Kennedy v. Bennett, 261 F. 2d 20, Traylor v. Black, etc., 189 F. 2d 213.) Any doubt as to whether the motion should be granted must be resolved against the movant. (Booth v. Barber Transp. Co., 256 F. 2d 927.) The function of a summary judgment is to eliminate sham issues (Irving Trust Co. v. U. S., 221 F. 2d 303).

It is our view that while petitioner waited nearly two years after the award of October 8, 1958 and the defendant's refusal to comply therewith before coming to this Court, the outcome of this litigation is of extreme importance to petitioner because of the large amount of money claimed as back wages and of possible importance to his Union because of principles of collective bargaining involved. In Kennedy v. Silas Mason Company, the Supreme Court, in the reported opinion (334 U. S. 249) observed at page 256:

> ". . . The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.

[fol. 55] "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

"We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. . . ."

We think this controversy should be decided as soon as possible, but on a record which will disclose clearly the matters this Court is to consider. If both counsel are of the view that an interpretation of the collective bargaining contract on its face will decide Mr. Gunther's rights, let them so state. If other matters are to be passed upon, let them be presented in proper form.

We believe that the motion for summary judgment should be denied as to ground I and II for the reasons we have stated. It is our further view that the motion should be denied, without prejudice, as to ground III. A minute order based upon this memorandum will be filed as of this date.

Dated this 27th day of March, 1961.

Jacob Weinberg, U. S. District Judge.

[fol. 56]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459-SD-W

(Formerly No. 36291—Civil No. 2080-SD-W)

[Title omitted]

ANSWER—Filed April 24, 1961

Comes now the defendant in the above-entitled action and, answering the petition herein, admits, denies and alleges as follows:

I.

Admits that this action was brought pursuant to 45 U.S.C.A. 153(p) and that this Court has jurisdiction over such an action.

II.

Defendant admits the allegations of paragraph II of the petition.

III.

Answering paragraph III of the petition, defendant admits that petitioner was employed by defendant on December 18, 1916, as a fireman; that on December 4, 1923, [fol. 57] he was promoted to locomotive engineer, which seniority date he had, in accordance with the applicable collective bargaining agreement, at the times mentioned in the petition. Defendant denies each and all of the other allegations contained in paragraph III.

IV.

Answering paragraph IV, defendant admits that petitioner's employment with defendant was subject to the terms of a collective bargaining agreement by and between

[File endorsement omitted]

the San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers; and defendant admits that there is no provision in said agreement relating to the age at which employees covered thereby should retire from active service. Defendant denies each and all of the other allegations contained in paragraph IV.

V.

Answering paragraph V, defendant admits that on December 30, 1954, it removed petitioner from active service as a locomotive engineer upon advice of the Chief Surgeon that petitioner had been physically disqualified from performing such service after physical examination. Defendant denies each and all of the other allegations contained in paragraph V.

VI.

Answering paragraph VI, defendant admits that following petitioner's disqualification from performing service as a locomotive engineer upon physical examination, as set forth in paragraph V, petitioner presented his claim for reinstatement to active service to defendant, with compensation for time lost by reason of said removal from service and, upon denial thereof, said claim was submitted to the First Division, National Railroad Adjustment Board, and said claim was assigned Docket No. 33531 by said Board; that thereafter on October 2, 1956, said Board [fol. 58] issued its purported decision under Award No. 33531, and its purported Order under the same award and docket numbers, copies of which are attached as Exhibit A to the petition. Defendant denies each and all of the other allegations contained in paragraph VI.

VII.

Answering paragraph VII, defendant admits that following the issuance by the First Division, National Railroad Adjustment Board, of said purported Decision and Order under Award No. 17646, Docket No. 33531, a board of three

physicians therein provided for was selected; alleges that the decision of said Board supported the decision of defendant's examining physicians and Chief Surgeon; and admits that thereafter defendant again refused to reinstate petitioner to active service. Defendant denies each and all of the other allegations contained in said paragraph VII.

VIII.

Answering paragraph VIII, defendant alleges that on March 22, 1957, petitioner filed "Petition to Enforce Award and Order of National Railroad Adjustment Board" in this Court under Civil No. 2080-SD-W; and that on April 15, 1958, at petitioner's request, this Court continued the cause to give petitioner an opportunity to request said First Division to review and interpret its said Award No. 17646 of October 2, 1956. Defendant admits that thereafter in June, 1958, petitioner forwarded to the First Division, National Railroad Adjustment Board, a document entitled "Ex Parte Submission From the Brotherhood of Locomotive Firemen and Enginemen vs. San Diego & Arizona Eastern Railway Company", asking said Board to render an interpretation of said purported award of October 2, 1956; and that on October 8, 1958, said Board issued two documents respectively entitled "Interpretation" and "Order", copies of which are attached as Exhibit B to the petition. Defendant denies each and all of the other allegations contained in paragraph VIII.

[fol. 59] IX.

Answering paragraph IX, defendant admits that following the issuance of the purported "Interpretation" and "Order" dated October 8, 1958, as set forth in paragraph VIII above, petitioner made demand upon defendant to comply with the terms thereof; that defendant refused to comply with said demand and suggested to petitioner that he should present Exhibit "B" to the petition to the Court in accordance with his motion for stay of proceedings in this Court in Civil No. 2080-SD-W, on July 14, 1958, which the Court had granted until Monday, February 16, 1959,

in order to enable petitioner to obtain from the National Railroad Adjustment Board, First Division, an interpretation of the Award and Order sued upon; and defendant alleges that notwithstanding the said action of this Court and the suggestion of this defendant and the representations by petitioner in a document filed in said action, petitioner, for reasons best known to him, failed and refused to make the said purported Interpretation and Order a part of Civil Action No. 2080-SD-W; that on April 8, 1959, this Court rendered judgment in favor of this defendant and against this petitioner, which said judgment has become final; and defendant admits that it has refused to comply with the provisions of said purported "interpretation" and "Order" of October 8, 1958, upon each and all of the grounds referred to in this Answer, including the lack of jurisdiction of the First Division, National Railroad Adjustment Board, the fact that in any event the Award is favorable to defendant and cannot be changed under the guise of interpretation, the constitutional and statutory defects in the procedure employed in connection therewith and the unwarranted attempt to interfere with defendant's efforts to provide safe transportation service to the public. Defendant denies each and all of the other allegations of paragraph IX.

[fol. 60]

X.

Defendant denies each and all of the allegations of said paragraph X and denies, in particular, that petitioner has been damaged or suffered any loss of wages in any sum or amount whatsoever.

XI.

Except as specifically admitted herein, defendant denies each and every other allegation contained in the petition.

First Separate Defense

For A First, Further And Separate Defense to said petition, defendant alleges and shows:

The petition fails to state a claim against defendant upon which relief can be granted.

Second Separate Defense

For A Second, Further And Separate Defense to said petition, defendant alleges and shows:

The petition herein relates solely to matters which have been adjudicated by this Court between the same parties and must be deemed to be finally and conclusively settled. Defendant alleges that the petition herein is barred by the doctrine of res judicata.

Third Separate Defense

For A Third, Further And Separate Defense to said petition, defendant alleges and shows:

The right of action set forth in the petition did not accrue within two years next before the commencement of this action. The right of action is barred by the applicable federal and state statutes of limitation.

Fourth Separate Defense

For A Fourth, Further And Separate Defense to said petition, defendant alleges and shows:

The purported Award, Interpretation and Order attached as Exhibits A and B to the petition are invalid, [fol. 61] void and unenforceable because each and all of them were purportedly rendered by the First Division, National Railroad Adjustment Board, which was without and in excess of its jurisdiction in connection therewith.

Fifth Separate Defense

For A Fifth, Further And Separate Defense to said petition, defendant alleges and shows:

The purported "Interpretation" and "Order" of October 8, 1958, attached as Exhibit B to the petition herein, are wholly void, invalid and unenforceable in that they were purportedly rendered by the First Division, National Rail-

road Adjustment Board, in a decision in which defendant had no notice or opportunity to be heard or represented at any stage thereof; and further that the purported action of the First Division, National Railroad Adjustment Board, in Exhibit B to the petition herein was not authorized or permitted by the Railway Labor Act and is further in violation of the 5th and 14th Amendments to the Constitution of the United States.

Sixth Separate Defense

For A Sixth, Further And Separate Defense to said petition, defendant alleges and shows:

The petition fails to show a claim against defendant within the jurisdiction of this Court.

Seventh Separate Defense

For A Seventh, Further And Separate Defense to said petition, defendant alleges and shows:

The petitioner has delayed filing the within action for an unreasonable length of time, to-wit, from and since October 8, 1958, although no new or different facts have developed and the within cause of action is barred by the doctrine of laches.

Wherefore, defendant San Diego & Arizona Eastern Railway Company, a corporation, prays that petitioner take nothing by his petition on file herein and that defen-
[fol. 62] dant have judgment and its costs of suit incurred herein and such other, further and different relief as may be proper in the premises.

A trial by jury is demanded in this action.

Gray, Cary, Ames & Frye, James W. Archer, Eugene L. Freeland, W. A. Gregory, William R. Denton, By W. A. Gregory, Attorneys for Defendant.

Dated: April 20, 1961.

[fol. 63] *Duly sworn to by K. K. Schomp, jurat omitted in printing.*

[fol. 64] Proofs of Service by Mail—omitted in printing.

[fol. 66]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT —Filed May 16, 1961

To: Hildebrand, Bills & McLeod, 1212 Broadway, Oakland 12, California; Charles W. Decker, 45 Polk Street, San Francisco 2, California; Gostin and Katz and Irwin Gostin and Louis S. Katz, Suite 725, U.S. Grant Hotel, 326 Broadway, San Diego 1, California, Attorneys for F. J. Gunther, Petitioner; and F. J. Gunther, Petitioner:

Please Take Notice that the San Diego & Arizona Eastern Railway Company will move the Court at the United States Custom House and Courthouse, San Diego, California, on Monday, May 29, 1961, at 2:00 P.M., or as soon thereafter as counsel can be heard, for entry of summary judgment herein in favor of San Diego & Arizona Eastern Railway [fol. 67] Company against F. J. Gunther, together with costs and disbursements, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and in support of this motion this defendant will present the affidavit and the memorandum of points and authorities attached hereto.

Defendant San Diego & Arizona Eastern Railway Company moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter judgment for the defendant on the ground that there is no genuine issue as to any

[File endorsement omitted]

material facts in this action, and that defendant is entitled to a judgment as a matter of law, as appears from the pleadings on file in this action and the affidavit and memorandum of points and authorities attached hereto and made a part hereof.

Respectfully submitted,

Gray, Cary, Ames & Frye, James W. Archer, Eugene L. Freeland, W. A. Gregory, William R. Denton, By W. A. Gregory, Attorneys for Defendant.

[fol. 68] Proof of Service by Mail (omitted in printing).

[fol. 69]

ATTACHMENT TO NOTICE OF MOTION, ETC.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil No. 2459-SD-W

[Title omitted]

AFFIDAVIT OF K. K. SCHOMP—Filed May 16, 1961

State of California,
City and County of San Francisco, ss.:

K. K. Schomp, being first duly sworn, deposes and says:

I am a citizen of the United States and of the State of California, residing in San Francisco County; my office headquarters are at 65 Market Street, San Francisco, California.

I am Manager of Personnel of the San Diego & Arizona Eastern Railway Company and am thoroughly familiar with the collective bargaining agreement relating to the

[File endorsement omitted]

wages, rules and working conditions of its personnel. In my present position I represent the Company in negotiations with representatives of the employees, including the employees engaged in engine, train and yard service rep- [fol. 70] resented by the various operating brotherhoods.

I make this affidavit for use in connection with the motion for summary judgment filed by defendant in this action. I am familiar with the case of Mr. F. J. Gunther, which is pending before this Court under the above-entitled number. I am also familiar with the collective bargaining agreement between the San Diego & Arizona Eastern Railway Company and the Brotherhood of Locomotive Engineers. In December, 1954, when Mr. Gunther last performed active service as a locomotive engineer, the applicable printed agreement was a green colored booklet dated March 1, 1935, which was on file with the Court as Defendant's Exhibit 1 in Mr. Gunther's prior case (Civil No. 2080-SD-W). A copy of this agreement has heretofore been filed with the Court in this case and copies have been distributed to petitioner's counsel and it is referred to herein as Exhibit "A" to this affidavit. On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform service.

Locomotive engineers employed by the San Diego & Arizona Eastern Railway Company are and have always been required to take and pass periodic physical examinations and reexaminations to determine their fitness to remain in service. In the year 1954 these requirements provided, and they still provide, that employees of age seventy and over must take and pass such a physical examination every three months. In accordance with the foregoing rule, Mr. Gunther reported for physical examination on November 24, 1953, and for additional examinations (reexaminations) in each successive three-month period to and including December 15, 1954. On the latter date Mr. Gunther

reported for and took his physical examination; and on [fol. 71] the basis of the findings during this examination the examining physicians determined that he was no longer physically qualified to remain in service as a locomotive engineer. These findings were reviewed at the Southern Pacific Hospital in San Francisco by the Chief Surgeon, who concurred in the findings and opinion that Mr. Gunther's heart was in such condition that he would be likely to suffer an acute coronary episode. Based upon this conclusion Mr. Gunther was physically disqualified, as aforesaid, on December 30, 1954.

I have examined the documents entitled Exhibits "A" and "B" to the petition in this action and find them to be true and correct copies of the documents issued by the First Division, National Railroad Adjustment Board, on the dates indicated thereon.

The defendant has published, throughout the years, a number of rules concerning its operations, the conduct and safety of its employees, physical examinations and standards and other subjects. Many of these rules are contained in the defendant's "Rules and Regulations of the Transportation Department", which booklet is attached as Exhibit "B". These rules must be complied with by the employees and are not a part of the collective bargaining agreement. The same is true of the rules relating to physical examinations required of operating employees, which I have described heretofore in connection with Mr. Gunther, and which require that all locomotive engineers in each category must take and pass periodic physical examinations in order to continue in active service.

Prior to and since December 30, 1954, the collective bargaining agreement attached as Exhibit "A" has been the contract governing the employment of Mr. Gunther. Until December 1, 1959, this contract contained no provision creating a three-doctor panel to review the physical condition of a locomotive engineer who has been removed from his position or restricted from performing service for this [fol. 72] reason on advice of the Company's physicians, nor for any other review of the decisions of the Company's

physicians on the subject. This fact was recognized by a demand served upon the defendant company under date of August 28, 1959, by the Brotherhood of Locomotive Engineers through its General Chairman, Mr. J. P. Colyar. Mr. Colyar has at all material times represented the locomotive engineers employed by defendant for collective bargaining purposes. A copy of Mr. Colyar's demand is attached, together with the amending agreement of December 1, 1959, as Exhibit "C".

Prior to December 1, 1959, the effective date of Exhibit "C", locomotive engineers disqualified upon advice of the company physicians for physical reasons were either permitted to work on a restricted basis or removed entirely from active service in accordance with the recommendations of the doctors. In Mr. Gunther's case the recommendation was that he should not be returned to duty. Accordingly the defendant took the within action. This is still the procedure followed by defendant subject to the terms of Exhibit "C".

Attached as Exhibit "D" is Decision No. 2860 in Case No. 2-ORC&B (Condr-Train) Supplemental List No. 11 of Special Adjustment Board No. 18 (Train and Yard Service Panel) dated July 22, 1959, in a case involving Southern Pacific Company in which the collective bargaining agreement was the same as Exhibit "A" insofar as it related to removal from service for physical disqualification. The agreement likewise did not contain any provision for a three-doctor panel.

K. K. Schomp

Subscribed and sworn to before me this 11th day of May, 1961.

H. G. Dunn, Jr., Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires June 25, 1963.

[fol. 72½] CLERK'S NOTE:

Exhibit B to Affidavit of K. K. Schomp, "San Diego & Arizona Eastern Railway Company—Rules and Regulations of the Transportation Department, Effective July 1, 1960" (omitted in printing).

[fol. 73] CLERK'S NOTE:

Exhibit C to Affidavit of K. K. Schomp, "Letter from J. P. Colyar, Chairman, Brotherhood of Locomotive Engineers to Mr. K. K. Schomp, dated August 28, 1959 and Agreement between San Diego and Arizona Eastern Railway Company and its Engineers represented by the Brotherhood of Locomotive Engineers signed on November 3, 1959 are omitted from the record here as they appear on pages 17-21 supra."

[fol. 77]

EXHIBIT D TO AFFIDAVIT OF K. K. SCHOMP

Org. file 313-M-14 (56) DECISION No. 2860
Co. file 011-122-2 (L) CASE No. 2-ORC&B (Condr-Train)
Supplemental List No. 11

SPECIAL ADJUSTMENT BOARD No. 18

(Train and Yard Service Panel)

PARTIES TO DISPUTE: Order of Railway Conductors and Brakemen
Southern Pacific Company
(Pacific Lines)

STATEMENT OF CLAIM: Claim of Brakeman O. F. Lemon, Tucson-Rio Grande Division, for the amount he would have earned, March 22, 1958, and subsequent thereto, had he been permitted to displace Brakeman T. E. Massey on Run 272, as requested.

STATEMENT OF FACTS: Oswell Farmer Lemon was employed as a student yardman on the Tucson Division on January

5, 1941, and was promoted to a yardman on February 5, 1941. On August 29, 1947, he exchanged seniority rights with a Tucson Division brakeman and thereafter performed service as such and on April 4, 1951, he was promoted to conductor.

While claimant Lemon was in his hotel at Lordsburg on August 19, 1956, his away-from-home terminal, he suffered an attack described as a convulsive seizure, which was witnessed by Dr. H. S. Cohen, a Southern Pacific Company Hospital Department physician, and other employes of the carrier. When claimant regained consciousness, he admitted to the doctor that he had previously suffered a similar seizure and that his doctor in Tucson had diagnosed his affliction as epilepsy. He further stated that his attack had occurred because he had run out of pills that he had been taking for epilepsy. When carrier's Chief Surgeon learned of claimant's condition through Dr. Cohen at Lordsburg, he sent a telegram to carrier's Division Superintendent at Tucson on August 28, 1956, as follows:

> "O. F. Lemon, brakeman-conductor recently under care of Dr. Cohen should not be returned to duty until authorized by this office. W-16."

whereupon the claimant was withheld from service and referred to the General Hospital at San Francisco for examination and observation.

On September 1, 1956, the claimant was admitted to carrier's General Hospital at San Francisco for investigation of grand mal seizures, where he remained until December 6, 1956. Report was received from Dr. Harriet S. Baritell at Tucson (physician selected by claimant), dated September 12, 1956, addressed to Dr. J. J. McGinnis of the Hospital Department giving medical history of the case, including the convulsive seizures, all of which was readily admitted by the claimant and his physician. Prior to leaving the General Hospital at San Francisco on December 6, 1956, the claimant refused further studies of his physical condition and he was not released for duty.

On February 20, 1957, claimant returned to the General Hospital at San Francisco where he remained through [fol. 78] March 18, 1957. When the claimant was discharged from the General Hospital on March 18, 1957, he was not issued a return-to-duty certificate because, as set forth in detail in carrier's submission, the findings of medical examinations developed claimant's physical condition disqualified him for the safe performance of his duties as a trainman.

The claimant has not performed service since August 28, 1956, and has been and presently is being carried on sick leave without being permitted to return to duty as a result of his physical condition, which carrier contends disqualified him for the safe performance of his duties as a trainman.

DECISION: This claim is based upon the contention that claimant Lemon was qualified for service with carrier on March 22, 1958, and subsequent thereto, and that he was originally withheld from service as a brakeman on the assumption he was not qualified because of health reasons. Claimant was disqualified for train service by the Chief Surgeon because of convulsive seizures. The evidence presented by the hospital authorities, together with their findings, clearly establish a case of disqualification, if we are to base our holding upon the findings of the hospital authorities, as we are to do, all as is hereinafter shown.

Petitioner contends claimant has been able at all times since March 22, 1958, to perform train service and that the medical authorities at the General Hospital erred in their findings of disability. Petitioner offers proof of this contention by statements of outside and independent doctors who support claimant's contention that he is and has been at all times pertinent to this dispute fully able to perform the service from which he was removed. Because of this conflict as between findings and opinions of the Southern Pacific Hospital authorities, including the Chief Surgeon, and these outside independent doctors petitioner asked for this Board to authorize a medical panel, to include outside

physicians, to examine claimant and that their findings in regard to his health condition be used in finally determining claimant's fitness to return to service as a brakeman.

The Board feels that it is entirely without authority to grant such a request. Absent an agreement between parties that such a panel might be, in such circumstances as these, set up and given authority to determine an employe's fitness for service we find no legal way it can be done.

We are not unaware of the fact that the First Division of the NRAB has, in some cases, sustained the contention of employes that it has a right to set up such a medical panel even in circumstances where the agreement between carrier and employes contains no authority therefor. There is also authority for denying requests to go outside the rules of agreement to set up functions generally. This, in [fol. 79] our opinion, is a matter that should be properly left for negotiation between carrier and its employes, if such an arrangement is to be deemed desirable. We do know that the general principle of recognizing in carrier the clear right to establish certain physical standards that all employes must meet is well established. See First Division Awards 16464, 16484, and Third Division Awards 728 and 2886 for examples.

The carrier's liability for the safe operation of its transportation facilities makes it responsible for the fitness of the employes to hold their respective positions. The carrier owes a duty to its patrons, as well as those engaged in the operation of the railroad, to exclude the unfit from its service. Moreover, the carrier has the right to establish certain reasonable physical standards that all employes must meet. This is not to say that employes do not also have a right, by virtue of their contract with carrier, to have any determination of unfitness for service based upon reasonable proof of unfitness. However, under the agreement between the parties as it is now written the hospital authorities make the final determination as to fitness for service.

When the Board requires the determination of an employe's physical fitness by the findings of a three-doctor

panel, as petitioner contends for, it is, in effect, making a new rule, which this Board is not authorized to do.

In an early award on the First Division (Award 3323) Referee Swacker pointed out that the First Division was not qualified and could not undertake to pass on the ability of an employe to meet operating rules' qualifications. This is, of course, the general tenor of all expressions on the subject on the First, and other, Divisions of NRAB.

The hazard involved in permitting employes to continue in service, when they have been found to be physically disqualified for the safe performance of their work, is clearly recognized. This involves not alone the safety of the employe himself, but the safety of his fellow employes and the public. The carrier not alone has the *right* to withhold such employes from service, but has the *duty* and *responsibility* to do so. This matter has been passed upon many times by the National Railroad Adjustment Board; some of the awards rendered by that and other tribunals being as follows:

First Division Award 12265, Referee O'Malley:

"... within good faith the carrier unquestionably is justified in removing from service a man whom its physicians regard as physically incapacitated."

First Division Award 12730, Referee Thaxter:

"The Carrier was fully justified in not returning this man to duty until it appeared that he could perform his work with due regard for the safety of the travelling public."

[fol. 80] *First Division Award 15181, Referee Coffey:*

"... the carrier acted only as reasonably prudent management would be expected to act, under the same or similar circumstances, and is not to be penalized on a record which shows it exercised its best judgment."

First Division Award 16484, Referee Scott:

". . . the benefit of any reasonable doubt over the physical condition of a . . . employe must be given the carrier.

* * *

". . . the carrier acted within its rights in determining that the claimant was disqualified for further service because of his impaired physical condition and in removing him from service for that reason . . ."

The carrier's position with respect to its right to select its own medical advisers, and to act on the basis of such competent medical advice, is sustained by Board awards as follows:

First Division Award 17458, Referee Stone:

". . . within reason a carrier must have the right to select its own medical advisers . . ."

First Division Award 16966, Referee Ferguson:

". . . His removal from service was only after complete medical investigation and on the basis of competent medical advice."

The claim for time lost was denied.

First Division Award 17135, Referee Rogers:

". . . That there is ample evidence in the record to support Dr. Cunningham's [examining surgeon for the carrier] conclusion there is no doubt.

"In the absence of arbitrary, capricious or prejudicial action by Dr. Cunningham, we are not warranted in reversing his opinion. He was authorized and qualified to weigh the evidence and reach a professional, factual conclusion for the carrier. We are not. It is not our prerogative to weigh the facts on either side for the purpose of making a finding of our own."

[fol. 81] *Special Adjustment Board 180, Decision 154:*

"The Chief Surgeon in making his findings as to an employe's fitness for service is not to be bound by the findings, diagnosis or prognosis of any outside or personal physician of the employee . . .

"The matter of whether an employe is or is not fit for service is to be determined solely by the findings of the hospital authorities . . ."

Third Division Award 2491, Referee Carter:

"It must be borne in mind that the carrier is primarily charged with the efficient and safe operation of its railroad. In its managerial capacity, it is charged with the selection of competent employes. Except where it has limited itself by contract, the right of selection is wholly within the discretion of the management . . ."

Special Adjustment Board 180, Decision 155:

"We cannot dispute the correctness of the hospital authorities' findings which show that claimant was properly withheld from service and subsequently restricted in the performance of his duties at all times in question.

". . . when the hospital authorities themselves determined that claimant was not physically or mentally fit for service or, that he could properly perform service only of a restricted type, this Board's inquiry must end . . ."

The courts have often stated that a Board, such as this, like the courts, cannot write a contract for the parties. Nor can this be accomplished indirectly under the guise of "interpretation and application" of agreements within the jurisdiction conferred upon the Board by the Railway Labor Act. The court in *Thomas* v. *New York, Chi. & St. L. R.R.*, 185 F. 2d 614, 617 (6th Cir. 1950), stated in part as follows:

> "While the Board under the Statute has jurisdiction to hear an individual grievance, it is not authorized to write a contract for the parties nor to create substantive legal rights."

In *Hunter* v. *Atchison T. & S.F. Ry.*, 171 F. 2d 594 (7th Cir. 1948), the court denied enforcement of a Board award, stating at page 599:

> "In reality, what the Board did was not merely to exercise its statutory authority to interpret and apply the contract as it existed but to make a new contract be- [fols. 82-83] tween the brakemen and the carrier. We think the five members of the Board who dissented from the Award properly characterized the action of the majority when they stated in their dissenting opinion: 'The lesson of the award is that contracts may be altered, changed, or amended, in plain violation of the Railway Labor Act, merely by the assertion of a claim which has no foundation for support in the agreement.' That these are the correct conclusions to be drawn from the wanton usurpation of power by the majority which voted for the award, is adequately fortified by the undisputed facts of record which were before us."

This principle was also applied in *Southern Pacific Company* v. *Joint Council Dining Car Employees*, 165 F. 2d 26 (9th Cir. 1947) cert. den. 68 S. Ct. 608 (1948). At page 28 the court said:

> "It [the Board] held that it would do no more than determine whether the furnishing of the meals was a part of the contract and leave to the courts the effect on the contract of Section 3(m) of the Act, stating 'From its inception this Board has consistently held that its functions are limited to interpreting and applying the rules agreed upon by the parties.' "

We will not undertake to review the evidence and findings going to claimant's unfitness for service beyond pointing out that such unfitness is amply supported by the findings of four doctors, all of whom are in agreement that he *has* suffered convulsive seizures, which, under the policy of the carrier, disqualifies him for service as a trainman. The disagreement as between the hospital doctors and claimant's outside physicians goes to the question of whether or not he now suffers from such seizures and should have been disqualified from service subsequent to March 21, 1958.

Since we cannot agree with petitioner's contention either that claimant was improperly withheld from service by carrier, or that we are authorized to, and should, set up a medical panel independent of the regular hospital authorities to determine his fitness for service, the claim must be denied.

The claim is denied.

/s/ THOMAS J. MABRY/mb
Thomas J. Mabry, Chairman and
Neutral Member

/s/ GEO. P. LECHNER
G. P. Lechner, Employe Member

/s/ J. J. CORCORAN
J. J. Corcoran, Employe Member

/s/ J. A. MCKINNON
J. A. McKinnon, Carrier Member

/s/ H. A. TEAL
H. A. Teal, Carrier Member

San Francisco, California
July 22, 1959.

[fol. 99]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459 SD-W

[Title omitted]

PETITIONER F. J. GUNTHER'S AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT—Filed May 29, 1961

State of California,
County of San Diego, ss.:

F. J. Gunther, being duly sworn, deposes and says:

That he is petitioner in the above entitled matter; that he makes this affidavit to be submitted to the Court in opposition to defendant's motion for summary judgment herein; that he has personal knowledge of the facts herein stated and, if called as a witness, he could and would testify to same; that for many years he was General Chairman of the Brotherhood of Locomotive Firemen and Enginemen and, as such, actively engaged in enforcing the provisions of the Agreement referred to in his petition herein and, additionally, employed as a locomotive engineer by the defendant herein; that he is thoroughly familiar with said Agreement and its interpretation and application by the parties thereto in the operations of defendant.

That, with respect to petitioner's right to continued em-
[fol. 100] ployment, said Agreement adopts the principle of seniority and provides:

"Article 35—Seniority

Section 1

Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as an engineer.

[File endorsement omitted]

Section 3 (b)

Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment."

That said Agreement also adopts the principle of discharge only for good cause and states:

"Article 47—Investigations

Section 1 (b)

No engineer shall be suspended or discharged, except in serious cases, where a fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials.

Section 1 (e)

If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid rate as set forth in Appendix 'B' for time lost on such account."

That, further, with respect to reduction in force, said Agreement provides:

"Article 38—Reduction of force

Section 1 (a)

When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off may, if they so elect, displace any fireman their junior under the following conditions:

* * * * *

Second: That when reductions are made they shall be in reverse order of seniority."

That said provisions are vague, ambiguous and insufficiently certain to specify, in and of themselves, the precise rights of the employees covered thereby with respect to duration of employment and the rights, if any, of the employer to restrict same.

That at all times pertinent herein the interpretation of [fols. 101-102] said provisions, and their application to defendant's operations, were done by reference to a long history of custom and practice in the railroad industry; that, for example, because the ". . . (R)ights of engineers . . . governed by seniority in the service of the Company . . ." were not specified in detail in said Agreement, their substance could only be, and was, determined by resort to custom and practice in the industry.

That at all times pertinent herein it was the custom and practice for engineers covered by said Agreement to bid for and retain assignments to active duty on the basis of seniority; that, therefore, the most senior engineer was entitled to the assignment of his preference and, in the event of elimination of such assignment by reduction of work force or otherwise, such senior engineer had the right to displace a junior and thus continue in active employment; that defendant's removal of petitioner from the assignment of his choice on December 30, 1954 was in violation of petitioner's seniority rights as conferred by said Agreement because, at said time, petitioner was senior to the engineer who replaced him on said assignment and, for that matter, to all other engineers in the employ of defendant.

That at all said times it was never the custom and practice for the active employment of an engineer covered by said Agreement to be terminated by retirement against the will of such engineer.

Dated: May 26, 1961.

F. J. Gunther

Subscribed and sworn to before me this 29 day of May, 1961.

Margit Nellaway, Notary Public, In and for the County of San Diego, State of California.

Margit Nellaway, My Commission Expires Oct. 1, 1963.

[fol. 104]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 2459-SD-W

F. J. GUNTHER, Petitioner,

v.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation, Defendant.

Appearances

Counsel for Petitioner:

Charles W. Decker, 45 Polk, San Francisco 2, California;

Gostin & Katz, 725 U. S. Grant Hotel, San Diego 1, California;

Clifton Hildebrand, Hildebrand, Bills & McLeod, 1212 Broadway, Oakland 12, California.

Counsel for Defendant:

Gray, Cary, Ames & Frye, James W. Archer, Eugene L. Freeland, 1410 Bank of America Building, San Diego 1, California;

W. A. Gregory, William R. Denton, 65 Market Street, San Francisco 5, California.

[File endorsement omitted]

[fol. 105]

OPINION—September 27, 1961

Petitioner is before the Court in this action with the second of two petitions seeking to enforce an award and order of the National Railroad Adjustment Board, hereinafter called the "Board". The first petition was filed in case No. 2080-SD-W, transferred to this Division from the Northern District. A motion for summary judgment was made by the defendant railroad, and we ruled that the record before us did not reveal an award and order with which the railroad had refused to comply. (Gunther v. San Diego, 161 F. Supp. 295.) On July 15, 1958 further proceedings were stayed because petitioner stated he had filed a petition before the Board for an interpretation of its award and order, or for the issuance of a supplemental award determinative of his right to reinstatement in active service with the defendant railroad. The Board did render an [fol. 106] award and order on October 8, 1958, but this second award was not presented to this Court in the case then before it, case No. 2080. In March, 1959, petitioner moved to dismiss the said case without prejudice; the Court denied the motion to dismiss and granted defendant's motion for summary judgment on the basis of the ruling mentioned above. In the findings and conclusions on motion for summary judgment, the Court found it was not necessary at the time to decide whether the Board had jurisdiction to order the appointment of a board of physicians to examine petitioner, and that it was not necessary at the time to consider the terms of the agreement between the defendant and petitioner's Union. The findings and conclusions in case No. 2080 are set forth in the Court's opinion reported at 192 F. Supp. 882.

Nearly two years after the rendition of the award of October 8, 1958, petitioner brought the same to the attention of this Court by a petition to enforce said award filed September 26, 1960. A motion for summary judgment filed by the railroad was denied without prejudice to the making of a similar motion on limited grounds. (Gunther v. San

Diego, 192 F. Supp. 882.) The railroad filed an answer, then a second motion for summary judgment, which was noticed for hearing on May 29, 1961; after statements, affidavits and briefs were filed and oral and written argument had, the motion was submitted on July 21, 1961.

The defendant is a Nevada Corporation, a railroad carrier subject to the Interstate Commerce Act, with its principal operating office located in the Southern District of California. Petitioner was employed by defendant on December 18, 1916, as a fireman and thereafter was continuously in [fol. 107] the active service of defendant until December 30, 1954. On said latter date, which was shortly after petitioner's 71st birthday, petitioner was disqualified from service after a physical examination. At his request, he was sent to the Southern Pacific General Hospital and there examined by carrier's medical superintendent, following which the chief surgeon determined that petitioner should not be returned to service. Petitioner's own physician disagreed with the company doctors as to petitioner's disqualification, and petitioner presented a claim to defendant for reinstatement to active service with back pay, and when defendant denied the claim, submitted the same to the National Railroad Adjustment Board, First Division. The findings and award of the Board, dated October 2, 1956 are included in the Appendix to this memorandum, as "Exhibit A". Following issuance of the award, a board of three physicians as therein provided was selected, and the Board, on October 8, 1959 made findings and award, which are included in the Appendix as "Exhibit B". Thereafter, defendant again refused to reinstate petitioner to active service. (Petitioner alleges the majority of the physicians found that he had no defect which in their opinion would prevent him from performing his duties as a locomotive engineer; defendant alleges the decision of the majority supported that of the Company doctors.)

The Board, in its award of October 8, 1959 ruled that the majority of the three physicians had decided petitioner had no physical defects which would prevent him from carrying on his usual occupation as engineer, and ordered

that petitioner be reinstated with pay for all time lost. [fol. 108] It is our view that the two awards and the two orders must be construed together as one award and one order, taking effect with the issuance of the second.

A collective bargaining contract was entered into between the Brotherhood of Locomotive Firemen and Enginemen, petitioner's Union, and the defendant on March 1, 1935. The Agreement is on file, and portions of the same referred to by petitioner in his affidavit and in the brief of his counsel and relied upon in support of his position herein, are found in the Appendix to this memorandum under headings: "Article 35, Seniority", "Article 38, Reduction of Force" and "Article 47, Investigations".

The defendant's motion for summary judgment asks this Court to rule:

"There is no genuine issue as to any material facts, and the undeniable facts show that there is no agreement provision to support the award and order in favor of petitioner and against defendant". and,

"The First Division, National Railroad Adjustment Board, issued its Award No. 17646, Docket 33531, and its order under said docket number, under date of October 8, 1958, in excess of its jurisdiction under the Railway Labor Act. Therefore, said Award and Order are unenforceable". (Defendant's proposed findings and conclusions filed May 16, 1961, p. 3.)

Petitioner's position is that the motion for summary judgment should not be granted because, in order to interpret the contract, it will be necessary to consider evidence of custom and usage . . . this for the purpose of arriving at the intent of the parties; he maintains that those por- [fol. 109] tions relating to his right of continued employment, to-wit, seniority and limited right of discharge, are ambiguous and require extrinsic evidence as an aid to their interpretation, and argues, at page 2 of his brief that "the unqualified right of defendant to determine the physical fitness of its employees is nowhere to be found in said

Agreement, whereas petitioner's right to continued employment is set forth in Articles 35 and 47 thereof" and at page 3, "The Agreement sued upon herein by providing for seniority rights and discharge only for good cause, limits the power of the employer to suspend or discharge employees from active employment."

The affidavit of petitioner in opposition to the motion for summary judgment offers testimony with reference to custom and practice. Mr. Gunther avers that for many years he was General Chairman of the Brotherhood of Locomotive Firemen and Enginemen and as such actively engaged in enforcing the provisions of the Agreement referred to in his petition. The affidavit then sets forth portions of Article 35 (Seniority), Article 47 (Investigations), and Article 38 (Reduction of Force) of the agreement and states that such provisions are vague, ambiguous and are not sufficient to specify the precise rights of the employees covered thereby with respect to duration of employment and the rights if any, of the employer to restrict same.

Petitioner continues: "That at all times pertinent herein the interpretation of said provisions, and their application to defendant's operations were done by reference to a long history of custom and practice in the railroad industry; that, for example, because the '. . . (R)ights of engineers . . . governed by seniority in the service of the Company [fol. 110] . . . were not specified in detail in said Agreement, their substance could only be, and was, determined by resort to custom and practice in the industry'." The affidavit details the custom with reference to seniority, stating that the most senior engineer was entitled to the assignment of his preference and, in the event of elimination of such assignment by reduction of work force or otherwise, such senior engineer had the right to displace a junior, etc., and further argues "that defendant's removal of petitioner from the assignment of his choice on December 30, 1954 was in violation of petitioner's seniority rights as conferred by said Agreement, because, at said time, petitioner was senior to the engineer who replaced him on said assign-

ment and, for that matter, to all other engineers in the employ of defendant."

Petitioner's affidavit further avers "that at all times it was never the custom and practice for the active employment of an engineer covered by said Agreement to be terminated by retirement against the will of such engineer."

The brief of petitioner also urges that custom and usage may be looked to to explain the meaning of language and to imply terms where no contrary intent appears from the terms of the contract.

The defendant has filed an affidavit which alleges that locomotive engineers employed by the railroad are and have always been required by Company policy to take and pass periodic physical examinations and re-examinations to determine their fitness to remain in service; that in the year 1954 these requirements provided and still provide that employees of age seventy and over must take and pass such a physical examination every three months; that in ac-[fol. 111] cordance with such rule Mr. Gunther reported for physical examination on November 24, 1953 and for additional examinations or re-examinations in each successive three month period to and including December 15, 1954; that after the examination on the latter date, the defendant's physicians determined that Mr. Gunther was not qualified to remain in service as a locomotive engineer; that these findings were reviewed at the defendant's hospital, and the Chief Surgeon of the railroad concurred in the findings and in the opinion that Mr. Gunther's heart was in such condition that he would be likely to suffer an acute coronary episode; that based upon this conclusion, the railroad declared Mr. Gunther physically disqualified.

The defendant's affidavit further states that prior to December 1, 1959 locomotive engineers disqualified upon advice of the company physicians for physical reasons were either permitted to work on a restricted basis or removed entirely from active service in accordance with the recommendations of the doctors . . . and the doctors recommended that Mr. Gunther not be returned to active duty, and the defendant followed the recommendation. Defen-

dant further states that until December 1, 1959 the Collective Bargaining Agreement between petitioner's Union and the defendant contained no provision for a three doctor panel to review the carrier's findings of physical disqualification. That on August 28, 1959, the Union asked that the Agreement be amended to include such a provision, the defendant acquiesced, and the amending agreement was made between the Union and the defendant on December 1, 1959.[1]

The major purpose of the Railway Labor Act (45 USCA, 151 et seq.) is to avoid strikes by employees of carriers in interstate commerce, and the consequent interruption [fol. 112] of interstate commerce, by promoting orderly and peaceful settlement of disputes affecting carriers and their employees. Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239. To that end, it is in aid of collective bargaining, and its design, purpose and result is to make such bargaining effective. Estes v. Union Terminal Co., 89 F. 2d 768. It is the duty of the employer and employee under the Act to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, and to consider and determine all disputes, if possible, in conference between employer and employee and authorized representatives of each. The policy of the Act is to encourage the use of nonjudicial processes; Brotherhood of Railroad Trainmen Enterprise Lodge No. 27, v. Toledo, etc., 321 U. S. 50. Thus, in the case of a "minor" dispute, one arising out of the interpretation or application of existing collective bargaining agreements and grievances arising therefrom, the parties are to confer, and if the dispute cannot be settled by conference, either party may resort to the appropriate division of the National Railroad Adjustment Board. With a "major" dispute, such as may arise from an intended change in agreements affecting rates of pay, rules or working conditions, resort to mediation and arbitration is provided for, 45 USCA 154, 155, 159. Elgin, J. & E. Ry.

Co. v. Burley, 325 U. S. 711, 722-724; Brotherhood of R. R. Trainmen v. Chicago, etc., 353 U. S. 30, 34; finally, the statute includes conciliation by presidential intervention. [fol. 113] We are here concerned with a dispute of the first mentioned class.[2] Subsection (i) of Section 153 (45 USCA) states:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and supporting data bearing upon the disputes.
>
> "(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, . . ."

The Section further provides that the awards shall be final and binding upon both parties to the dispute,[3] except insofar as they shall contain a money award, and that if a dispute arises concerning the interpretation of the award, the Board shall interpret the same upon request of either party. When an award is made in favor of the petitioner, the Board shall direct the carrier to make the award effective.

Subsection (p) provides that if the carrier does not comply with the order, the petitioner may file in the District Court of the United States a petition, setting forth briefly the causes for which he claims relief, and the order of [fol. 114] the Board, whereupon the suit shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the Adjustment Board shall be prima facie evidence of the facts therein

stated.[4] The District Courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

The National Railroad Adjustment Board, created by statute June 21, 1934 (Section 153 of Title 45 USCA, a portion of the "Railway Labor Act", 45 USCA 151, et seq.) has 36 members, 18 of whom are selected by carriers and 18 by national labor organizations. The Board acts through four divisions, the first of which has jurisdiction over disputes involving train and yard-service employees of carriers, such as engineers, firemen, etc., and which has 10 members, 5 selected by carriers and five by national labor organizations. Any division has authority to establish Regional Adjustment Boards to act in its place and stead (with the same force and effect) for such limited periods as deemed necessary, membership to be divided equally between those designated by the carrier and labor members. The Section provides that upon the inability of a Division (or a Regional Board) to agree because of a deadlock or a failure to secure a majority vote, it may appoint a neutral person as Referee to sit as a member to make the award.

Each of the decisions of the First Division of the National Railroad Adjustment Board with which we are here concerned was made with the aid of a Referee.

[fol. 115] This Court has jurisdiction in the premises; the Railroad Adjustment Board has made an award in favor of an employee of a carrier engaged in interstate commerce, and the carrier has refused to comply with the order.

The jurisdiction of the Railroad Adjustment Board is limited to disputes over the interpretation and application of collective bargaining contracts between the carriers and their employees. Southern Pacific Co. v. Joint Council Dining Car Employees, 165 F. 2d 26.[5] Where, as in this case, the employee maintains he was removed from service in violation of the contract, and where the carrier claims

the removal did not violate the contract, a dispute concerning the interpretation or application of a collective bargaining agreement of which the Board has jurisdiction under the Act is presented.

The Agreement must be deemed to incorporate the provisions of the statute, thus we must examine both the Railway Labor Act and the Agreement in making our decision to enforce or set aside the decision of the Board. The petitioner is entitled to reinstatement only if wrongfully removed from service, and he was wrongfully removed only if some right arising out of the contract or the law was violated.

The employer-employee relationship existed long before the origin of collective bargaining agreements made effective by labor laws, and one of the common law rights inherent in such a relationship is the right of the employer to hire and fire his employees. This right exists today, except to the extent that it may be modified by statute or contract. United States Steel Corp. v. Nichols, 229 F. 2d 396. Such right is not abridged by the Railway Labor Act or the Labor Relations Act so long as the collective [fol. 116] bargaining process is not impaired. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45; Texas & N.O.R. v. Brotherhood of Ry. and S. S. Clerks, 281 U.S. 548; N.L.R.B v. Superior Co., 199 F. 2d 39, 42; N.L.R.B. v. Tennessee Coach, 191 F. 2d 546, 550; Beeler v. Chicago R. I. & P. Ry. Co., 169 F. 2d 557, 560.

No claim is made that petitioner's union activities or lack of them had anything to do with his removal from service.

In interpreting this particular Agreement, and in order to call to our aid the reported cases, it is necessary to consider the nature of the collective bargaining process, as well as the numerous types of agreements to which the published opinions relate. The collective bargaining provisions of the Railway Labor Act are similar to those of the Labor Relations Act, and cases interpreting the provisions of agreements executed under one Act may be of aid in interpreting agreements under the other, pro-

vided we do not overlook differences in the types of agreements or in the laws relating to their enforcement.*

The Agreement before us is what we might call a "barebone" agreement, in that it relates mainly to wages, hours, seniority, and discharge. No mention is made regarding disability of an engineer, other than in Article 29, where it is stated that if an engineer is physically disabled on account of the loss of the sight of one eye, and is required to give up his run, he will have the privilege of displacing any engineer junior in branch service. (No provision is made for an engineer losing *both* eyes.)

The simplicity of the Agreement is understandable in view of the fact as stated by eminent writers on the [fol. 117] subject (Professors Archibald Cox and John T. Dunlop, "Regulation of Collective Bargaining by the National Labor Relations Board", Harvard Law Review, 1950, Vol. 63, pp. 389, 391), that in early years of collective bargaining the unions were busy organizing additional workers and securing agreements on familiar subjects, and many unions, strong enough to present broader demands, were content to bargain on such traditional subjects as wages, hours of work, seniority and union status.

Some of the modern-day agreements contain clauses setting forth certain areas as "strictly within management prerogatives", others contain clauses to the effect that "past practices shall not be changed except by mutual consent", still others provide that neither side "will assert any right during the term of the contract to bargain on any subject covered or referred to in the contract", still others contain "no-strike" clauses and provide that disputes over the interpretation of the contract shall be referred to arbitrators. As was said by the Supreme Court in Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 580, "The mature labor agreement may attempt to regulate all aspects of the contemplated relationship from the most crucial to the most minute over an extended period of time".

None of the provisions mentioned in the preceding paragraph is found in the Agreement involved herein.

Professors Cox and Dunlop, in the article above cited, have noted that as union power increased, some sought to expand the scope of joint-management decisions into areas for which management traditionally had exclusive responsibility—not only pensions and merit increases, but also the scheduling of shifts, subcontracting and technological [fol. 118] change—expanded the scope of their demands until they came in contact with management's reluctance to surrender its "prerogatives" and sharp controversies resulted over the proper functions of management and union.

It is just such a "sharp controversy" that we have before us, except the controversy is not between the Union and the carrier, but relates only to an individual employee. Management claims that the employee must point to a provision in the Agreement prohibiting the action it took, the worker points to the provisions regarding seniority and discharge but in the same breath says they are ambiguous and must be explained by extrinsic evidence, and in another breath intimates that even if with these aids his position is not clarified, the Railroad Adjustment Board has power to "imply" terms into the contract to support its decision.[7]

What rights did the Railroad possess when it went into the bargaining room with the Brotherhood 26 years ago? What rights did it lay on the bargaining table? Were all of those rights mentioned in the contract? Or did the Union put some in its pocket to use when needed? Or did management retain those not in the contract?

We know that management took with it the common law right to hire and fire at will, except for certain statutory restrictions not pertinent here. It is our task to ascertain what happened to such right and what portion of it resided with the defendant when it removed petitioner from service.

It is obvious from a reading of the Agreement that neither the seniority clause (lay-off provisions refer also to seniority) nor the clause pertaining to discharge (headed "Investigation") contains any words referring to retirement for physical disqualification or for any other reason.

In fact the entire agreement has no words referring to such [fol. 119] matters, other than the clause we have mentioned having to do with an engineer who has lost one eye.

Perhaps because the meaning of "seniority" is so well understood and judicially determined, there have been few cases where the issue of retirement for any reason as contravening the seniority clause by itself, has been considered by the courts. In most of the reported cases, if seniority is referred to by the employee in presenting his case against retirement, it is coupled with a contention that the retirement violated both the seniority and discharge clauses of the collective bargaining agreement.[8]

Hon. Paul J. McCormick, the late Chief Judge of this District, sitting with the Court of Appeals of our 9th Circuit, observed, most aptly in Colbert et al. vs. Brotherhood of Railroad Trainmen et al., 206 F.2d 9, 13, that "seniority among railway workers is contractual and it does not arise from mere employment and is not an inherent, natural or constitutional right." (See also, Ford Motor Co. v. Huffman, 345 U.S. 330, 337-339; Aeronautical Industrial District Lodge 727 vs. Campbell, 337 U.S. 521, 526-527; Trailmobile Co. vs. Whirls, 331 U.S. 40, 52-54; N.L.R.B. vs. Int. Assoc. of Machinists, 279 F.2d 761, 765; McMullans vs. Kansas etc. Ry., 229 F.2d 50, 53.)

We have no difficulty in ascertaining the meaning of "seniority" as it appears in this Agreement, and our interpretation is in accord with that of many reported opinions. Seniority, as it applies to trainmen, means: "the oldest man in point of service (*ability and fitness for the job being sufficient*) is given the choice of jobs, is the first promoted within the range of jobs subject to seniority, and is the last laid off. It proceeds so on down the line to the youngest in point of service." Dooley vs. Lehigh Valley [fol. 120] R. Co. of Penna. 130 N.J. Eq. 75, 21 A.2d 334, 335, affirmed per curiam, 131 N.J. Eq. 468, 25 A.2d 893. (Emphasis supplied.) (See also: Seaskiewicz vs. General Electric Co., 166 F.2d 463, 465; Fine vs. Pratt, 150 SW 2d, 308, 311, an oft cited decision; Order of Railway Conductors of America vs. Shaw, 189 Okl. 665, 119 P.2d, 549.)

In Goodin vs. Clinchfield Railroad, etc., 125 F. Supp. 441, affirmed (per curiam) 229 F.2d 578, cert. den. 351 U.S. 953, the question was whether the action of the union and the employer in agreeing to add a compulsory retirement clause to the contract contravened the employees' rights under the contract, including seniority rights, and the District Court stated, p. 448:

> "If the Railroad through union contract surrenders its right to terminate plaintiffs' employment at an age of its own choosing and accepts seventy as the termination age, this is no more than an implied agreement by the Railroad to continue the employment of conductors and trainmen until they reach seventy before terminating because of age. Without the contract the employer could terminate them at any time. A collective bargaining agreement upon age seventy as the termination age is not an abridgement of any right of the employees but only an abridgement of the employer's right."

The opinion in United Protective Workers of America vs. Ford Motor Co., 194 F.2d 997, 1002, to which we shall refer later in another connection, held compulsory retirement of an employee did not violate the seniority provisions of the contract because such retirement was not a "lay-off". [fol. 121] In Held vs. American Linen Supply, 307 P.2d 210, the Supreme Court of Utah, citing Fine vs. Pratt, Tex. Civ. App. 150 SW 2d, 308, said:

> "The right of seniority as hereinbefore defined is not inconsistent with the right of the employer to discharge his employee. A right of seniority as we think of it exists upon the assumption of a continuing employment. It is superimposed upon status of employer and employee."

We turn now to the provision of the Agreement between petitioner's Union and the Railroad which has to do with discharge, Article 47, headed "Investigations". We find

wording that "no engineer shall be suspended or discharged except in *serious cases* where *fault* is apparent without a fair and impartial hearing." (Emphasis supplied.) We note the engineer is entitled to select an engineer in his same seniority district to represent him, or the regularly constituted committee of the Brotherhood of Locomotive Engineers can appeal through the proper officials to the highest authority; when a formal investigation is held, the engineer is entitled to representation by his Local (union) or any employee in his seniority district; the Superintendent or his representative may interrogate as may the engineer and his representative. We note also the following wording: "Where *charges* are made regarding engineers, same must be in writing. No *demerits* will be charged against the engineer's record without giving him an opportunity for *defense* and allowing him to present his side of the case, and finally (Section 1(d)):

> "If an engineer is suspended or discharged and is proven to have been *innocent of the offense charged,* [fol. 122] he shall be reinstated and paid $8.79 per day for time lost on such account." (Emphasis supplied.)

We have been able to discover only one reported judicial decision, where a situation is presented in any way similar to the one before us.

In Wilburn vs. Missouri-Kansas-Texas R. Co. of Texas, 268 S.W. 2d, 726 (Texas App), the railroad employee sued in the state court for damages for wrongful discharge. He said that he had been examined by the company doctor, told he was physically disqualified and removed from work on the railroad. He maintained he was entitled to an examination by a Board of Doctors (to be appointed in the same manner as decreed by the Railroad Adjustment Board in this case) and that he was refused such examination, and that the refusal and his consequent discharge constituted a breach of the collective bargaining agreement. He pleaded a portion of the agreement, Rule 81(a) which read that no employee should be discharged or suspended without *just and sufficient cause* without being given an investigation,

hearing, witnesses, etc. "and if found not *guilty*" (emphasis supplied) he should be reinstated with back pay.

The Court noted that the employee received notice of his removal from work in February of 1950, and that a provision regarding the employees' right to an examination by a Board of Doctors was not added to the collective bargaining agreement until April of 1950. In speaking of Rule 81(a) of the Agreement, the Texas Court observed that applicant's tenure of employment would have been "at will" except for said Rule relating to wrongful discharge, and that such a provision bore no relation to a removal from service because of physical disqualification, [fol. 123] but had to do with disciplinary measures. In holding that the plaintiff had no cause of action for wrongful discharge under the Agreement as it stood when he was disqualified, the Court stated at page 734:

> "There is a wide difference between a discharge because of affirmative action and a disqualification on account of physical disability as expressed in the contract which has been pleaded by the plaintiff."

We have read carefully the two cases entitled United Protective Workers vs. Ford Motor Company, 194 F.2d 997 and 223 F.2d 49. We have likewise studied the decision in U. S. Steel Corp. vs. Nichols, 229 F.2d 396 (reversing Nichols vs. National Tube Co., 122 F.Supp. 396) where some attention was given to established practice of the industry. We do not view these cases as authority that we should consider custom and practice in this case. These decisions deal with compulsory retirement because of age only, refer to "just cause" provisions in the contracts, and do not indicate these contracts contained wording such as in the Agreement before us. It is true that here, as in the three cases just cited, the employee's service was terminated just as effectively by retirement as by discharge, but the contracts appear to be different, and as was said in the Nichols case (229 F.2d 396, 402) " . . . in dealing with rights and obligations under a written instrument we cannot ig-

nore distinctions expressly made by the wording of the instrument merely because the end result is the same".

The Agreement before us does not state that if an employee is discharged without "just cause" he is to be reinstated. It says if he "is found innocent of the offense charged" he must be reinstated. This phrase and the other words we have emphasized "fault", "charges", "demerits", [fol. 124] "defense" show that a "derogatory type of discharge" because of violation of a rule made for, or commission of an act detrimental to, the good of the service is contemplated. To apply these terms to an obviously upright and faithful employee such as petitioner would be inconceivable.

We hold that the seniority and discharge clauses of the Agreement are unambiguous, do not require the introduction of oral testimony in aid of their interpretation and do not, either singly or jointly, prohibit the retirement of an employee deemed physically disqualified by his employer to perform the duties of his position.

It is plainly indicated that by the seniority and discharge clauses we have discussed the defendant surrendered a portion of its common law right to manage its business as it saw fit. We think it is necessary for us to decide if, by the act of entering into a collective bargaining agreement, other management rights became affected, though not adverted to in the contract. This calls for a consideration, we believe of the "residual" or reserved rights theory: that management remains free to control its business except as limited by the collective bargaining contract.[10]

We find early enunciation by the courts supporting the "residual rights" theory in collective bargaining under the Railway Labor Act. We believe the first case in which a court construed the award of a Railroad Adjustment Board was Estes v. Union Terminal Co., 89 F. 2d 768. There the learned Circuit Judge Hutcheson (5 Cir.) in a strong concurring opinion (p. 774), observed that the individual employees had no individual rights which they could press against the employer as to tenure or seniority apart from the test of the collective bargaining agreement, and sub-

ject to the agreement any of them could be let out at the will of the carrier.

[fol. 125] Again referring to the opinion in the case of Goodin vs. Clinchfield Railroad, supra (129 F.Supp. 441, affirmed 229 F.2d, 578, cert. den. 351 U.S. 953) from which we have quoted when discussing seniority, we emphasize the phraseology which states that the acceptance of an employer of a compulsory retirement provision is a *surrender* of his right to terminate the employee at any time.

In Brotherhood vs. Atlantic Coast Line R. Co., 253 F.2d 753, 758, the National Railroad Adjustment Board ordered an employee reinstated who had been discharged because he allowed a photographer to come on railroad property and take pictures to be used against the company in a damage action. The Board held that because the employee had violated no rule of the agreement the discharge was arbitrary. The Court of Appeals sustained the lower court in refusing to enforce the Board's order and stated that the Board was "manifestly in error in holding that the discharge was wrongful merely because no rule of the current bargaining agreement had been violated."

Reviewing cases decided under the National Labor Relations Act we likewise find definite views that some of the inherent rights remain in the employer after the collective bargaining contract is executed.

In J. A. Case vs. Labor Board, 321 U.S. 332, at 335, the Supreme Court remarked:

> "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge."

[fol. 126] The Inland Steel decision, supra (170 F.2d 247, cert. den. 336 U.S. 960) held (p. 252) that absent a retirement clause in the agreement (which already included seniority and discharge provisions) the Company could retire the employee at any age.

In United States Steel Corp. vs. Nichols (supra, 229 F.2d 396) the Court of Appeals at page 398 of the decision mentioned that the lower court was of the opinion that the employer could not withhold an employment right unless such withholding was recorded or reserved by the contract, and that there was no contractual right of the employer in the collective bargaining agreement which authorized him to compulsorily retire an employee because of age. In reversing the District Court, the Court of Appeals referred to N.L.R.B. vs. Jones and Laughlin Steel Corp. 301 U.S. 1, 45, and stated that the common law right of an employer to select and hire employees and terminate employment was not inhibited by any statute applicable to the case before it, and ruled: (p. 399)

> ". . . It would seem to logically follow that the common law right on the part of the employer to select his employees and to terminate their employment at will continues to exist except to the extent that it may be modified by the bargaining contract with the Union. Instead of making this right dependent upon a provision to that effect in the contract, it is a right which an employer normally has unless it has been eliminated or modified by the contract. Accordingly, we are not in agreement with what we construe to be the District Judge's conclusion of law that since there was no provision in the collective bargaining contract [fol. 127] authorizing the termination of appellee's employment by reason of age, such right did not exist."

At another paragraph on the same page we find the following language:

> ". . . Although it may be the theory of the law that collective bargaining may at times or eventually accomplish that result, the express language of the Labor-Management Relations Act, Sec. 158(d) Title 29 U.S. C.A. and the authorities above referred to make it clear that a collective bargaining agreement does not necessarily express the full coverage of employment rights.

> It covers such matters only as the parties may have been able to agree upon and leaves unresolved such issues as the parties may not have been able to agree upon and with respect to which the law does not require a concession by either party."

The Court of Appeals felt it necessary to determine from a consideration of the contract whether termination because of age was prohibited instead of searching for a provision authorizing it, and observed at page 400:

> "This requires the application of the usual rules involved in the construction of a written instrument."

In N.L.R.B. vs. Nash-Finch Co., 211 F.2d 622, a case cited in the Nichols case as sanctioning the application of the usual principles of contract construction, the employer, after a collective bargaining contract had been executed, terminated certain insurance and Christmas bonus benefits. [fol. 128] The Court of Appeals (Judge Sanborn speaking) refused to sustain the finding of the National Labor Relations Board that the employer had committed an unfair labor practice and in setting aside the Board's order said: (p. 626)

> "Where parties to a contract have deliberately and voluntarily put their engagement in writing in such terms as import a legal obligation without uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing. Ford vs. Luria Steel & Trading Corp. 8 Cir. 192 F.2d 880, 884 and cases cited.
>
> "The following language from Printing & Co. vs. Sampson, L.R. 19 Eq. 462, 465, has several times been approved by the Supreme Court of the United States: '. . . if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have utmost liberty of contracting, and that their contracts, when entered into

freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.' See Baltimore & Ohio S.W.R. Co. vs. Voight, 176 U.S. 498, 505, 20 S.Ct. 385, 387, 44 L.Ed. 560; Twin City Pipe Line Co. vs. Harding Glass Co., 283 U.S. 353, 356, 51 S.Ct. 476, 75 L.Ed. 1112."

[fol. 129] In addition to subscribing to the familiar principles of contract law announced in the Nash-Finch and Nichols cases just discussed, we find that other principles of the law of contracts apply. In Atlantic Coast Line Railway Company v. Brotherhood, 210 F. 2d 812, 813, the Court observed that collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity, and the Court in Virginian Railway etc. Co. v. System, 131 F. 2d 840, 842 counsels that collective bargaining agreements be given a realistic interpretation. It would indeed be "unrealistic and absurd" to hold that if an engineer did not wish to retire he might keep his hand on the throttle during the remainder of his lifetime.

Another principle which we find applicable here is that an exception to what is normally included in a particular type of a contract should be, and usually is, spelled out with such clarity that there can be no doubt as to its meaning. Sigfred v. Pan America etc., 230 F. 2d 13, 18. A provision restricting an employer's right to retire an employee because of age or physical disqualification, would have been an exception in the era in which this Agreement was negotiated, the year 1935. This, because the first authoritative ruling placing compulsory retirement among the subjects upon which the Act permitted collective bargaining, and holding that the employer was at least required to discuss such a matter with the union, was the decision, in 1948, in Inland Steel Co. v. National Labor Relations Board, supra, 170 F. 2d 247, cert. den. 336 U.S. 960. In this case the Court stated that seniority and discharge provisions had long been accepted as matters for negotiation. And, as late as [fol. 130] 1956 we find able-bodied engineers over 70 con-

tending that a compulsory retirement provision at age 70 which the union and the employer had added to the agreement was not properly a subject for collective bargaining. McMullans vs. Kansas, Oklahoma and Gulf Railway, 229 F.2d 50, cert. den. 351 U.S. 918. See also Goodin vs. Clinchfield, etc. 125 F.S. 441, affirmed 229 F.2d 578, cert. den. 351 U.S. 953.

Finally, it appears to this Court that there is language in the opinion in Steelworkers vs. Warrior & Gulf Co., 363 U.S. 574 (1960) at p. 583, which supports the theory that rights of the employer not treated in the contract are left for the employer to exercise, at least where a "bare-bone" contract such as the Agreement here is presented.

> "Collective bargaining agreements regulate or restrict the exercise of management functions. They do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement it may be exercised freely except as limited by public law and by the willingness of employees to work under the particularly, unilaterally imposed conditions. *A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages.* When, however, an absolute no strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either [fol. 131] management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes." (Emphasis supplied)

Accordingly, we hold that the right of the carrier to terminate the employment of its workers, except as prohibited by statute, remains with such carrier to the extent not surrendered by the terms of a collective bargaining agreement, and that the extent of such surrender is to be determined by the plain words of the agreement under the rules governing the interpretation of contracts.

The carrier here exercised a right which it had not surrendered by the act of executing a collective bargaining agreement, or by virtue of its terms.

There is another principle of contract interpretation which applies to collective bargaining agreements. A right of termination which remains with the employer has attached to it his implied covenant not to use it in bad faith and unfair dealing to destroy or injure the employee's right to the fruits of the contract. (See Williston, Contracts, Rev. Ed. 1936, Section 670; Cox, "Legal Nature of Collective Bargaining Agreements, University of Michigan Law Review, Nov. 1958, Vol. 57, No. 1, p. 1, 17.)

It is in some of the cases where a bad motive or unfair dealing with intent to frustrate rights under the agreement is charged that we find evidence of custom and usage in plant and industry, established practices and so on, introduced either to establish unfair motive or to refute the existence of it. This is especially true of cases under the National Labor Relations Act.[11]

Here no bad faith motive or unfair dealing was charged in the complaint, and none was found by the Railroad Adjustment Board. In fact, from the record before the Board [fol. 132] as the same is set out in the findings (we refer both to the first, or conditional award and the second or final award) the contrary appears. This, especially, considering the known fact that the operation of a train is an exacting task, a dangerous and hazardous business, (Chicago & A. R. Co. vs. U. S., 247 U.S. 197; Atchison R. Co. vs. U. S., 244 U.S. 336) that the carrier is chargeable with the utmost care and diligence,[12] that the petitioner had been twice examined by the carrier's physicians and twice found disqualified, and that it cannot be said the retirement of a 70 year old engineer is not directly related to the safety of the public, whether he is physically disqualified or not. (Goodin vs. Clinchfield, supra, 125 F.S. affirmed per curiam 229 F.2d 578, cert. den. 351 U.S. 953.)

We are able to accord prima facie weight to all findings of fact of the Board which are here material—that is, when it is possible to separate such findings from conclusions

of law.[13] But a Railroad Adjustment Board must operate on jurisdictional tracks, laid out by statute, their scope reaching only so far as the limits of the Agreement. If a derailment occurs, the order or award is unenforceable.[14]

The Board should have interpreted the Agreement as we have done here, and should have dismissed the claim prior to making its first, or conditional award.

Instead, it proceeded to construe its jurisdiction erroneously, in view of the Agreement as it then stood. Then it proceeded to set up a board of physicians to make its decision for it, a procedure not consonant with a "desirable degree of uniformity" among Railroad Adjustment Boards, a procedure without a shred of sanction from contract or statute.[15]

In such a situation, we do not think there is represented [fol. 133] the type of administrative construction to which we are required to make judicial obeisance.[16]

It is possible the Board was actuated by a desire to perform a public service, and a procedure similar to that it prescribed was, as we have mentioned, several years later incorporated into the Agreement through collective bargaining under the provisions of the statute relating to change of contract. Such change did not have a retroactive effect.

It is desirable to settle controversies on the basis and within the confines of existing contracts wherever possible, instead of compelling resort to the machinery provided by statute for changing collective bargaining agreements. This principle has been established, probably because those construing the agreement feel that when all is quiet on the labor front there is no use risking hostility at the bargaining table. Management and unions may also feel reluctance, for once negotiations are started about a new clause, management may ask the relinquishment of a right already conceded, or labor make other demands.

A purpose of the Act, however, is to encourage collective bargaining. Just as a garment may become too short or too small to cover a growing child, so may a bargaining agreement fail to meet requirements of both labor and manage-

ment as the years go by. A wise tailor knows that a garment may be stretched just so far without weakening the fabric or pulling it apart at the seams, and he will add a new piece of material rather than ruin the entire garment.

Neither the Board nor this Court could stretch this 1935 bargaining agreement to cover the situation which arose in 1954. A new piece, but from the material of employer's residual rights, had to be added. That the employer chose [fol. 134] to relinquish the material, and what the result will be of allowing others than itself to determine the fitness of engineers to handle the dangerous instrumentalities of its locomotives, is not for the consideration of this Court in this particular litigation. Neither the Court nor the Board could be the tailor who added the material. The task belonged to labor and management.

The record before us shows there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Rule 56, Rules of Civil Procedure.)

The award and order of the Railroad Adjustment Board should not be enforced.

Dated this 27th day of September, 1961.

Jacob Weinberger, United States District Judge.

[fol. 135] Opinion Notes to case No. 2459-SD-W, F. J. Gunther v. San Diego & Arizona Eastern Railway Company, a corporation.

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[1] We speak of the contract as it read at the time of petitioner's disqualification from service, unless otherwise indicated.

[2] Brotherhood, etc., v. N. Y. Central R. Co., 246 F. 2d 114, cert. den. 355 U.S. 877.

[3] The words "final and binding" have their limitations. Dahlberg v. Pittsburgh & L. E. R. Co. et al, 138 F. 2d 121, 122. When the award is unfavorable to the employee, the Board's decision is final. Washington Terminal Co. v. Boswell, 124 F. 2d 235, 245, affirmed 319 U.S. 732. When it is unfavorable to the carrier, the decision may not be enforced except as the court orders, after an enforcement suit is brought by the employee. The Court hears the case *de novo* and may enforce or set aside the Board's decision.

[4] The duties of the Court with reference to the findings and awards of Railroad Adjustment Boards have been well defined in the reported cases. Washington Terminal Co. v. Boswell, supra, n 3. states at p. 241: "It cannot be assumed, therefore that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to [fol. 136] that of expert testimony." Dahlberg v. Pittsburgh & L.E.R. Co. et al, supra, (n 3.) at p. 122: "The Act provides that the suit for enforcement shall 'proceed in all respects as other civil suits' except that the findings and award 'shall be prima facie evidence of the facts therein stated'. . . . These procedural directions are particularly appropriate to a trial on the merits of disputed issues of both fact and law; less so to a mere examination of the scope of the Board's authority. Some of the reasons assigned for the weight to be given the Board's findings are: The employee has the advantage of having a prima facie case prepared for him when he files an enforcement suit in the District Court and is thus spared such expense, Washington Terminal V. Boswell, supra; The Board has "expertise adapted to interpreting such agreements", Elgin J. & E. R. Co. v. Burley, 327 U.S. 661, 664, 665; and as observed in Slocum v. Delaware, etc. 339 U.S. 239, 243, "Precedents established by it, while not necessarily binding provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railroad systems".

[5] Cert. den. 333 U.S. 838; Thomas v. New York C. & St. L. R. Co., 185 F. 2d 614, 616.

[6] In this connection, we keep in mind Mr. Justice Rutledge's warning in Washington Terminal Co. v. Boswell, 124 F. 2d 235, 243, affirmed 319 U.S. 732, against ignoring "the always present limitation upon judicial language imposed by the facts concerning which it is used."

[fol. 137] [7] Some of the language in the 1960 Supreme Court opinions, United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564; United Steelworkers of America v. Warrior and Gulf, etc., 363 U.S. 574 and United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 might seem to lend support to petitioner's theory. For instance, in the Warrior case opinion, at pp. 578 and 579 it is said:

> "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman, Reason, Contract and Law in Labor Relations, 68 Harv. L. Rev. 999, 1004-1005. The collective agreement covers the whole employment relation-

ship. It calls into being a new common law—the common law of a particular industry or of a particular plant. . . ."

The opinion (p. 579) quotes Professor Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498-1499:

". . . (I)t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and the employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage an enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is [fol. 138] founded. . . ."

Likewise, there is language in the first two sentences of a paragraph in the Enterprise opinion which seems to aid petitioner, but serves to leave him without comfort in the third, pp. 598, 599:

"The collective bargaining agreement could have provided that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they returned to work. Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon contract. *The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. . . .*"

We emphasize the last sentence because, under the Railway Labor Act the District Court *is* required, in a suit for enforcement of an award, to review the merits of every construction of the contract.

In the Enterprise case, the Court further discussed the finality of the arbitrator's award, and stressed the premise that "the question of interpretation of the collective bargaining agreement is a question for the arbitrator." It stated: (p. 599)

"* * * * * It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business [fol. 139] overruling him because their interpretation of the contract is different from his."

In the American case the Court similarly stressed the importance of the arbitrator, at page 568:

"* * * * * Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment *and all that it connotes* that was bargained for." (Emphasis supplied.)

In the Warrior case at p. 581, the Court stated:

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of the courts * * * *"

The Court also, at p. 581, quoted from the late Dean Schulman, as follows:

> "'A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties * * * *'"

There are other pronouncements in these opinions which serve to underline the Supreme Court's views of the arbitrator's functions and the finality to be accorded his decisions. We need not set them [fol. 140] all out, for their phraseology likewise makes it clear that the references are to provisions in modern-day contracts unlike the Agreement here, and to rules of enforcement not intended to be applicable under the Act which governs this Court in this proceeding.

In Brotherhood, etc. v. Atlantic Coast Line R. Co., 253 F. 2d 253, Chief Judge Parker of the Fourth Circuit, said at p. 757:

> "If it had been intended, as appellant argues that the orders of the Board rendered pursuant to 45 U.S.C.A. 153 should have the effect of awards of arbitrators, some such provisions as are contained in 45 U.S.C.A. 158 and 159 which relate to arbitration under 45 U.S.C.A. 157 would have been provided for their enforcement. The fact that an entirely different provision was made for the enforcement of arbitration awards entered under the existing statute relating to arbitration is a matter which cannot be ignored and which shows clearly that Congress did not intend Board orders to have the effect of arbitration awards".

[8] There are several interesting decisions in the Labor Arbitration Reports. Most of the arbitrators, when considering seniority have likewise considered the discharge clause of the labor contract in connection with retirement for age.

In Todd Shipyards Corp., 27 LA 153 the arbitrator held that the employer might put a compulsory retirement plan into effect [fol. 141] if no restriction in the contract and if in conformity with established policy. To the same effect, is Sandia Company, 27 LA 669.

Another interesting arbitration decision is that of Louisville Public Warehouse, 29 LA 128. There it was held that a discharge for age was not permitted where the contract prohibited "discharge except for cause". This decision enunciated the ruling that the management had the authority to discharge because of *inability*, and said the employer had the sole right to determine whether an employee was capable, so long as determination was not arbitrary, capricious or discriminatory. Transworld Airlines, Inc., 31 LA 45 held definitely that retirement for age contravened the seniority provision, and cited Nicholls Tube Co., 122 F. Supp. 726, which case was later reversed in 229 F. 2d 396. The Transworld case attached significance to the contract clause that older employees should be given lighter work.

In Hale Brothers Stores, 32 LA 713, the arbitrator quoted the Court of Appeals decision in U.S. Steel v. Nichols, 229 F. 2d 396, at 400, and approved of the wording which stated in effect that instead of searching for a provision in the contract authorizing termination, the court should look to see if the same were prohibited. The arbitrator remarked that "the reserved rights theory expounded by the Circuit Court is perfectly orthodox arbitration doctrine." This arbitrator held that the introduction of an involuntary retirement plan because of age only, where no established plan had been in effect violated employment security, but did not refer to a particular clause in the contract.

In Western Air Lines, 33 LA 84, 87, the arbitrator held that [fol. 142] retirement was not covered under the heading of seniority; that there was nothing in the agreement between the union and the employer to prohibit forcing a pilot to retire at age 60, and a common law right to manage its affairs furnished a proper basis for such action of the employer.

[9] In commenting upon the addition to the colllective bargaining agreement of the clause providing for the appointment of a board of physicians, the Court further observed: "This, in our opinion, is a matter that should be properly left for negotiation between carrier and its employees, if such an arrangement is to be deemed desirable. *We do know that the general principle of recognizing in carrier the clear right to establish certain physical standards that all employees must meet is well established* • • • •" (Emphasis supplied.)

[10] Eminent writers have discussed this subject frequently:

In the February, 1961 issue of the Labor Law Journal (Col. 12, No. 2, p. 167) Frank R. DeVyver, Chairman of the Department of Economics and Business Administration at Duke University, Durham, North Carolina, said:

> "American employers are bound by a collective bargaining agreement which runs for some fixed term. Under these agree-

ments, management remains free to lay off workers, and shifts, remove shifts, and change the methods, processes and materials [fol. 143] of work—subject only to the protection of the rights of workers contained in the agreement."

Gerald D. Reilly, 1957 Vice-Chairman of the American Bar Association Labor Law Section, in Labor Law Review, January, 1957, Vol. 8, No. 1, 19 at 23, observed:

> "Most lawyers conceive, and I think correctly—of a collective bargaining agreement as limiting management's discretion only in respect to such matters affecting employer-employee relationships as are specifically touched upon in the contract. This theory of residual rights, however, has not been universally accepted by arbitrators."

Professor Cox, "Legal Nature of the Collective Bargaining Agreement", 57 Michigan Law Review, 1958, 1959, at p. 35 said, in discussing what he termed the "reserved rights view":

> "* * * Most judges appear to adopt this position without qualifications, although few of them have felt impelled to state the doctrine squarely. Professor Gregory may overstate the case when he says that apart from its unpopularity with unions the doctrine is generally accepted, but I suspect a poll of arbitrators would give the doctrine a majority, provided that the ballot was secret. Furthermore, it is at least historically accurate to describe collective bargaining agreements as instruments by which the unions have gradually taken away the erstwhile prerogatives of management."

[fol. 144] And on the question of whether custom and practice should be read into Agreements we note the following expressions:

In an article entitled "Reason, Contract and Law in Labor Relations," 68 Harvard Law Review, 1955, p. 999 at 1011, the late Dean Schulman stated he doubted if there were any general understanding among employers and unions about the "viability of existing practices during the term of a collective bargaining" and was of the opinion that in many enterprises the execution of a collective agreement would be blocked if it were insisted in a broad provision that 'all existing practices, except as modified by this agreement shall be continued for the life thereof' and that the execution would also be blocked if the converse provision were demanded.

In "The Duty to Bargain Collectively During the Term of an Existing Agreement," Harvard Law Review, 1950, Vol. 63, No. 7, p. 1097 stated at p. 1118 that the writers advocated a view of construction which would hold that the parties to "a *comprehensive* collective bargaining agreement, in the absence of contrary evidence, are to be presumed to have executed the agreement upon the understanding that major conditions of employment not covered

by the agreement would continue 'as they were' unless changed by mutual agreement". (Emphasis supplied.)

In the articles from which we have quoted Dean Schulman, Professor Cox and Professor Dunlop, they plainly were referring to collective bargaining agreements with arbitration clauses.

[fol. 145] [11] United Protective Workers of America v. Ford Motor Co., 194 F. 2d 907, 1003.

N.L.R.B. v. Adkins Transfer Co., 226 F. 2d 324, 325.

N.L.R.B. v. McGahey, 233 F. 2d 406, 411.

United States Steel Corp. v. Nichols, 229 F. 2d 396, 402.

[12] In Minneapolis, etc. v. Rock, 270 U.S. 410, 414, the Supreme Court said:

> "The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the Act is calculated to stimulate them to the proper performance of that duty. Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations."

In Ford v. Carew & English, 200 P. 2d 828 (Cal. App. hearing denied) the statement of facts showed that a 67 year old driver for a limousine carrier of passengers lost consciousness at the wheel and crashed into a light standard. The evidence showed that he possibly suffered from "strained heart muscles". The Court held that whether the defendants had reason to anticipate such an attack was a question for the jury.

[fol. 146] [13] There is no conflict between the Board's findings as to material facts and those alleged in the pleadings and affidavits on file in this case.

[14] Thomas v. New York, Chicago & St. Louis R. Co., 185 F. 2d 614, 617:

> "* * * While the Board under the statute has jurisdiction to hear an individual grievance, it is not authorized to write a contract for the parties nor to create substantial legal rights."

[15] There are many decisions construing action of a National Labor Relations Board whose general effect may be applied to a Railroad Adjustment Board: N.L.R.B. v. Union Pacific States, 99 F. 2d 153, 177 (9 Cir., Judge Garrecht), the Act is not intended to empower the Board to substitute its judgment for that of the employer in the conduct of his business; Martel Mills Corp. v. N.L.R.B.: Board in protecting employee and promoting industrial peace must likewise be mindful of the welfare of the honest em-